SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, *Appellant*,

v.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees*.

On Appeal From the United States District Court for the Central District of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, the City of New York, appeals from two final orders which denied the City's pre- and post-judgment applications to intervene and from the consent judgment approved by the United States District Court for the Central District of California.

OPINIONS BELOW

The district court's oral opinion of October 28, 1969, and its memorandum opinion subsequently filed on November 7, 1969 have not been officially reported. These opinions are set forth in Appendix A, *infra*, pp. 1a-15a.

JURISDICTION

On January 10, 1969, the United States instituted this civil antitrust action against the defendants pursuant to 15 U.S.C. § 4. The City of New York, by appropriate applications, sought leave to intervene both before and after the district court's approval on October 28, 1969 of a consent judgment submitted by the parties. By orders entered on October 28, 1969 and December 16, 1969, the district court denied the City's intervention applications. On December 22, 1969, the City filed a notice of appeal in the United States District Court for the Central District of California. This Court has appellate jurisdiction by virtue of 15 U.S.C. § 29. See *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129, 131; *Sam Fox Publishing Company* v. *United States*, 366 U.S. 683.

QUESTIONS PRESENTED

1. Does an antitrust defendant have a right to entry of a consent decree lacking *prima facie* effect pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), so long as it consents to all of the Government's demands for relief except the demand for an adjudication that it violated the antitrust laws?

2. If not, may a district court approve a consent decree lacking in *prima facie* effect over the opposition of responsible public bodies without requiring the decree's proponents to furnish a record sufficient to per-

mit the court to make an independent, judicial determination that entry of the decree is in the public interest?

3. Where a responsible public body seeks intervention in an antitrust case alleging an interest in the subject matter and contending that the United States has not adequately represented its interest because of its decision to present a consent decree lacking *prima facie* effect without providing the district court with a record sufficient to establish that the decree is in the public interest, is that public body entitled to intervene either before or after entry of the consent judgment?

STATUTES INVOLVED

Section 5(a) of the Clayton Act, 15 U.S.C. § 16, and Rule 24 of the Federal Rules of Civil Procedure are set forth in Appendix B, *infra*, pp. 15a-16a.

STATEMENT

On January 10, 1969, the United States instituted this civil antitrust action charging the Automobile Manufacturers Association, the major automobile manufacturers and a number of alleged co-conspirators, with combining and conspiring in unreasonable restraint of interstate trade and commerce in motor vehicle air pollution control equipment in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] The

[1] In January 1965, the Department of Justice instituted a civil investigation to explore charges that the automobile industry had violated the antitrust laws by conspiring and agreeing to delay the development and installation of motor vehicle emission control devices. In July 1966, a federal grand jury was convened to pursue this investigation and after eighteen months, during which a number of witnesses were examined and thousands of documents inspected, the grand jury was discharged without returning an indictment.

gravaman of the Government's complaint[2] was that the defendants and their alleged co-conspirators had agreed to eliminate all competition in the development of air pollution control equipment and that they had agreed and conspired "to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment."[3]

The defendants did not answer the complaint. Instead, following the entry of several stipulations extending their time for answer, the parties filed a stipulation for entry of a consent judgment terminating the litigation. The district court entered an order setting the matter for hearing and invited interested persons to submit memoranda of their views.

Pursuant to the district court's order, the City of New York applied for leave to intervene "for the limited purpose of participating in the proceedings to be held in connection with the stipulation and proposed consent judgment * * *." The City did not take a position on the merits of the proposed decree, arguing instead that "the record presently before the Court is insufficient to permit an informed determination that the proposed judgment is consistent with the public interest." The City suggests that the parties be required to provide the court "with a record demonstrating that on the basis of a full investigation the evidence available to [the Government] demonstrates

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[2] The complaint is set forth in Appendix C, *infra*, pp. 17a-25a.

[3] The complaint particularized the three separate occasions on which the defendants were charged with agreeing not to install presently available antipollution devices. App. C, *infra*, pp. 22a-23a.

that the proposed judgment is fully consistent with the public interest." Alternatively, the City suggested that the court condition its approval of the decree upon the inclusion of a provision, patterned after the so-called "asphalt clause",[4] making the judgment *prima facie* evidence of the statutory violations set forth in the complaint.

The district court held a hearing devoted to legal arguments from proponents and opponents of the decree. At the conclusion of oral argument, the court denied all applications for intervention and approved the consent decree as submitted by the parties. In its oral opinion, the court set forth its reasoning:

> "In approaching this problem the court must move cautiously lest it override an administrative decision based upon matters of policy with which this court cannot properly interfere.
>
> "Consent decrees which result from informal negotiations between the Antitrust Division and defendants in these cases are numerous, and they are most always without exception ratified by the court with little or no change.
>
> "Under well-established law, this decree must be approved unless this court finds some legal defect in it such as its unenforceability according to its terms, or its failure to provide relief which is consistent with the complaint. It is the court's duty to protect the rights of persons who are not parties to the action and, of course, the decree should not be approved if it is contrary to the public interest." App. B, *infra*, p. 3a.

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[4] See *United States* v. *Lake Asphalt & Petroleum Co. of Mass.*, 1960 Trade Cas. ¶ 69,835 (D. Mass. 1960); *United States* v. *Allied Chemical Corp.*, 1961 Trade Cas. ¶ 69,835 (D. Mass. 1960); *United States* v. *Bituminous Concrete Assoc.*, 1961 Trade Cas. ¶ 69,878 (D. Mass. 1960).

Subsequently, the court filed a memorandum opinion. App. B, *infra*, pp. 9a-15a.

Thereafter, the City applied for leave to intervene *after* judgment for purposes of taking an appeal to this Court. In that application, the City alleged that even if the United States had adequately represented its interests prior to judgment, those interests were no longer being adequately represented since the United States did not contemplate seeking appellate review of the district court's determination to approve the decree without requiring the parties to provide a record basis for concluding that the decree was in the public interest. The district court denied that application by order entered December 17, 1969.

THE QUESTIONS ARE SUBSTANTIAL

The City of New York contended below that a consent decree not otherwise admissible as *prima facie* evidence should not be entered unless and until the proponents of that decree presented a record sufficient to enable the District Judge independently to determine that the proposed decree was in the public interest. Here, the District Judge concluded that the decree *was* in the public interest, but he did so without requiring the parties to furnish a record sufficient to support that determination. Such a procedure can be justified only if: (1) an antitrust defendant has a *right* to a consent decree without *prima facie* effect when it accedes to all substantive demands for relief set forth in the Government's complaint or (2) the district court has no independent judicial function to perform when a proposed consent decree without *prima facie* effect is challenged by a responsible public body. These issues, which this Court left open in *United*

States v. *Ward Baking Co.*, 376 U.S. 327, 332, are deserving of plenary consideration, not only because they are substantial, but because they frequently recur.[5] Until this Court speaks, both public agency litigants and trial courts are without firm guidelines in this important and much litigated area of the antitrust laws.

1. By submitting a consent judgment, the parties sought judicial action.[6] Proper discharge of that judicial function required the District Judge "to make an independent judgment as to the merits of an antitrust consent decree." *Utah Public Service Comm.* v. *El Paso Natural Gas Corp.*, 395 U.S. 464, 476 n. 4 (Harlan, J., dissenting). The City contended that the absence[7] from the decree of a provision having Section 5(a) consequences was a matter calling for the trial court's independent determination that the proposed decree was in the public interest. The trial judge held that such an absence was not to be considered in deciding whether the decree satisfied the public interest. App. A at 3a.

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[5] This Court has been repeatedly confronted with appeals arising from consent judgment proceedings in antitrust cases. *E.g.*, *United States* v. *Ward Baking Co.*, 376 U.S. 327; *Utah Public Service Comm.* v. *El Paso Natural Gas Corp.*, 395 U.S. 464; *City of New York* v. *United States*, 390 U.S. 715; *Thrifty Shoppers Script Co.* v. *United States*, 389 U.S. 580.

[6] *E.g.*, *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-148 (S.D.N.Y. 1962); *cf. United States* v. *Swift & Co.*, 286 U.S. 106; *United States* v. *Radio Corp. of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796; *Chrysler Corp.* v. *United States*, 316 U.S. 556, 567-571 (Frankfurter, J., dissenting).

[7] In its complaint, the Government sought an adjudication "that the defendants have engaged in a combination and conspiracy, in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Sherman Act." App. C, *infra*, pp. 23a-24a.

In *United States* v. *Ward Baking Co., supra,* 376 U.S. at 334, this Court left open the question whether an adjudication having *prima facie* effect constituted an independent item of relief so that, even were a defendant to consent to all of the Government's other demands for relief, a consent judgment could nonetheless be withheld. Given the strong Congressional policy undergirding Section 5(a) of the Act, we think the issue left unanswered in *Ward Baking* must be answered in the affirmative here. The Antitrust Division agrees that it has authority to withhold approval of a consent decree lacking *prima facie* effect. Assistant Attorney General McLaren recently stated:

> "I would not expect to see an 'asphalt clause' contained in any great number of consent decrees in the future. However, in situations where the Division has determined to oppose the entry of nolo pleas in order to aid private litigants, but where the court nevertheless accepts the nolo pleas, it would seem to follow that in any companion civil case the Division should consider going to trial if the defendants will not agree to the inclusion of an 'asphalt clause' in the decree. In making this determination, we would consider whether the strength of the Division's civil case is such that there is a substantial chance to obtain a favorable judgment."[8]

There are, it is true, counterveiling considerations bottomed in the consent decree proviso which Congress included in Section 5(a) and which one district court found persuasive in holding that defendants do have a right to insist upon entry of a consent decree lacking *prima facie* effect as long as they are willing to accede

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[8] *The Government and the Private Antitrust Suit,* Department of Justice Release, December 11, 1969, p. 13.

to all of the Government's other demands for relief.[9] But this only serves to emphasize the need for plenary consideration of this important and recurring issue.

2. Assuming that an antitrust defendant does not have a right to insist upon a consent decree lacking in *prima facie* effect [10] even though it is otherwise willing to accede to the Government's other demands for relief,[11] the district court was required to make an independent, judicial determination that the omission was in the public interest. In making that determination, the court would properly give weight to the Attorney General's determination that the decree was in the public interest, and the court would consider that settlement of antitrust litigation is encouraged by the Congressional policy reflected in Section 5(a)'s proviso. But granting all of this, the district court could not, we submit, resolve the public interest issue *in vacuo*.

The record before the District Judge consisted solely of the Government's complaint and the proposed de-

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[9] *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wisc. 1962).

[10] Such effect would follow from an adjudication after trial. Its substantial equivalent would be the insistence, either administrative or judicial, on the inclusion of an "asphalt clause" before a consent decree is approved.

[11] It is arguable that the decree did not provide all the relief which would be available to the Government following trial. Under the prayer for "other, further and different relief," the Government would be entitled to relief consonant with the evidence introduced. *United States* v. *Ward Baking Co.*, *supra*, 376 U.S. at 333 and n. 3. Such relief may well have included a decree requiring the defendants to install antipollution devices on cars now on the road. The district court, however, held the "other, further and different" relief clause to mean "little if anything." App. A, *infra*, p. 4a. *Ward Baking* teaches otherwise.

cree. If the allegations of that complaint were true, the defendants had flagrantly and deliberately violated the antitrust laws for more than fifteen years and had thereby endangered the health of millions of people and had been the direct cause of incalculable damage to the City of New York and other heavily populated urban areas plagued with air pollution problems. If substantial evidence were available to prove these allegations, and if there were no counterveiling considerations advanced by the defendants, the District Judge could well have concluded that the decree was contrary to the public interest. Cf. *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 166 (S.D.N.Y. 1955); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-148 (S.D.N.Y. 1962).

Here, the District Judge purported to find the decree in the public interest, but he failed to avail himself of the one indispensible ingredient of judicial action—a record sufficient to permit informed adjudication of the issue. We contend that as proponents of the decree, the United States and the defendants had an obligation to provide the court with a record sufficient to permit informed decision of the public interest issue. Perhaps written submissions from the parties would have sufficed,[12] or perhaps other acceptable alternatives were available. We assume that the district courts have a wide latitude in consent judgment proceedings, and that the record required to demonstrate that a particular decree satisfies the public interest will vary from case to case. But we think it perfectly plain that, assuming a consent decree calls for a judicial

[12] Compare the procedure followed in *United States* v. *Standard Oil Co.*, 1959 Trade Cas. 75522, 75526 (S.D. Calif. 1959).

determination of the public interest issue, that issue cannot be resolved, as the District Judge tried to resolve it, by laying the complaint alongside the decree. App. A, *infra*, pp. 3a-4a, 14a.

3. Resolution of these issues is determinative of the City's intervention application which forms the predicate for appellate review here. Had the court properly considered the public interest issue on an appropriate record, it could have denied intervention on the ground that the City's interest had been adequately represented. But when it failed to do so, it became clear that the City was entitled to intervene—not only because its interests were inadequately represented by the parties,[13] but also because there is no other way by which appellate review of these important issues can occur.[14]

CONCLUSION

The procedure followed in the district court raises questions of fundamental importance in the administration of the antitrust laws. These questions, which are as difficult as they are significant, should be resolved following full briefing and argument. Since the City's right to intervene depends upon resolution of the other issues presented, an order should be entered postponing consideration of the question of jurisdic-

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[13] *E.g.*, *Cascade Natural Gas Co.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129.

[14] *E.g.*, *Banks* v. *Chicago Grain Trimmers Assoc.*, 389 U.S. 813; *Zuber* v. *Allen*, 387 F. 2d 862 (D.C. Cir. 1967); *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9 Cir. 1953); *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944).

tion until the hearing of the case on the merits. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683.

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APPENDIX A—OPINIONS OF THE DISTRICT COURT

Oral Opinion, October 28, 1969

The Court [Curtis, J.]: Very well. I take it, then, the hearing has come to a completion.

First of all, I want to thank all those who have appeared as friends of the court. I have appreciated your comments and they have been very helpful.

I have, of course, had the benefit of all of the arguments of counsel for some time, and I have read them. My law clerk and I have done research which seems to have been necessitated here, so I must admit that I came into the hearing with a pretty fair idea of what the outcome of this case would probably be unless there were some suggestions made here today or some argument which I had not thoroughly considered.

Of course, as I stated this morning, I can only say again that it is very—well, first of all, before I commence that I should state that it is my intention to write an opinion and file a written opinion here which will cover the legal aspects of the case and which will be published and which all attorneys will understand so that they can understand my position.

I realize, though, that a lot of people have come a long way and there are a lot of people in the audience who have been asked to come here and appear. I feel that it might be wise for me to, since I know what I am going to do, speak informally and in a non-legalistic fashion so that you may better understand the problem that confronts this court and the conclusion to which the court has come.

I have already expressed my personal feelings about air pollution, the importance of the problem, and the urgency of its solution. I have already mentioned that it is a problem of Government and that it is the function of the Administration acting through various departments and agencies to initiate and to pursue a program of research and

development of its own and to acquire all possible knowledge in order that it may make its proper recommendations to Congress and Congress may pass the needed legislation in order that it may be informed to the point where it can set up effective administrative means for the regulation and control of these factors contributing to the problem.

Congress has a duty, too, that of making laws which are helpful and necessary. The courts have a function and that is to stand ready to assist at all times in the implementation of these administrative decisions.

It is our constitutional concept of Government that Government moves forward smoothly when our three branches of Government—the executive, the legislative and the judicial—each functions in its own sphere of authority. It is inappropriate for any one branch of Government to exercise the prerogative of another. It is elementary political science which I know we all know.

The Department of Justice, whom this court must assume is the representative of the people, has brought this action by way of an administrative decision made by the Department of Justice to fashion an action of this kind. They brought this action into this court alleging that the automobile manufacturers had engaged in a conspiracy to eliminate competition and asking as its sole remedy that the court enjoin the defendants from engaging in conduct consisting of a long series of acts enumerated in the complaint and thought by the Government to be a violation of the Antitrust Act.

Now, I am not going into the technical aspects of the Government's theory here. We only know from some of the intimations what its theory is. But it seemed quite clear to those who are knowledgeable in this field that the Government is proceeding on a somewhat novel theory, and it is one in which there has been no precise court decision. So, after having filed this action and after many months of

working where parties have worked together with technical advisers, they have negotiated and reached a settlement of this lawsuit upon terms and conditions which have been set forth in the proposed consent decree and which they now ask this court to approve.

In approaching this problem the court must move cautiously lest it override an administrative decision based upon matters of policy with which this court cannot properly interfere.

Consent decrees which result from informal negotiations between the Antitrust Division and defendants in these cases are numerous, and they are most always without exception ratified by the court with little or no change.

Under well-established law, this decree must be approved unless this court finds some legal defect in it such as its unenforceability according to its terms, or its failure to provide relief which is consistent with the complaint. It is the court's duty to protect the rights of persons who are not parties to the action and, of course, the decree should not be approved if it is contrary to the public interest.

After a careful review of the proposed decree and a reading of the voluminous opposition to it, and in light of the research which we have done and the hearing here today, it seems clear to me that the decree must be approved for the following reasons.

In the first place, the decree is legally enforceable on its face. I have heard no contention to the contrary.

Secondly, it is consistent with the prayer in the complaint, in spite of what has been said here. It is, as has been said, substantially consistent. The allegations with respect to prior antitrust violations is a necessary allegation and a necessary finding if this case were to go to judgment, but if it is not to go to judgment it does not become a necessary finding.

The prayer for such relief as may seem proper is a general catchall clause, as all attorneys know, and it means little if anything.

With those exceptions, the decree provides substantially, as near as I am able to tell, all of the benefits which the complaint seeks.

Thirdly, the decree does not prejudice the rights of treble damage claimants. It has been, of course, contended that the Government has the duty to bring this case to judgment so that treble damage claimants may have the benefit of its judgment as prima facie proof of liability in treble damage suits. The law does provide that treble damage claimants may use such a judgment as prima facie evidence of liability, but it also provides that cases of this kind may be settled without an admission of liability.

Congress did that for a very definite reason and that is for the reason, such as exists here, to permit a ready and definite conclusion to these cases without the long expense of a trial.

And as has been mentioned here, this is nothing unusual, this is done all the time. The Government settles between 70 and 75 percent of its antitrust cases in this fashion. If it didn't it would not have the personnel to run the office.

There is no authority to the effect that the Government has the duty to try any case merely for the purpose of aiding treble damage claimants in their individual suits. I have had none cited to me. As far as I know there is no such authority, and I see no basis to compel the Government here to do that.

The treble damage claimants are free to bring any kind of an action they wish. The State of California and the other States may bring any kind of an action which they can maintain without being affected in the least by the decree in this action.

Lastly, it appears to me that this decree is in the public interest for it gives the Government all the relief it could have gained if it had tried the case and won. It avoids a tremendous expenditure of taxpayers' money and the exhaustion of Antitrust Division manpower. And it brings immediate results.

If this case were to go to trial, although there has been some contention about it to the contrary, I think there is little doubt but what it would take between four and five years of discovery, preparation and trial of this case. The small amount of evidence which is now in the hands of the Department of Justice and was obtained through the Grand Jury investigation, I think, would be a small thimbleful of evidence in comparison with that which would be required if this were to go to judgment.

Furthermore, this decree brings an assured result. The thing that amazes me is that all of the opponents seem to assume with such assurance that if this case were tried the Government would win. Now there are many knowledgeable people who disagree with this.

It would seem to me it would be tragic if this court would refuse to sign the decree and compel the Government to go to trial only to lose the case, which would mean that the benefits of this decree, which are great, would be lost to the entire country forever, and it would help the treble damage claimants not a whit.

The proposed decree, for the reasons which I have enumerated, will be approved.

I have not mentioned all of the arguments that have been made here. There have been a lot of them made. It does not seem to me that the others need answering in view of my views as expressed here.

Now, I think it is plain that from what I have said that I shall deny all petitions of those wishing to intervene in this action as parties. I think it has not been seriously

urged and, if so, not convincingly so, that these petitioners are entitled to intervene as a matter of right. Almost all of those wishing to intervene are treble damage claimants—that is the basis of their contention that they intervene because of their treble damage claims—and the cases are very clear that the interest of treble damage claimants is not cognizable as an interest such as will entitle the claimant to intervene in an injunction action of this kind.

Rule 24(b) suggests that permissible intervention shall be allowed only where it will not delay or prejudice the adjudication of the rights of the original parties. Now, there can be no doubt but what permitting the intervenors here to become parties in this suit could do nothing but prejudice and delay and cause interminable confusion in handling the action which is now pending before this court.

The other intervenors, there are some who have other claims upon which they would base their right to intervene—they are varied, and I think each one can be answered from a substantive standpoint. But, in any event, none of them have been made timely, and they will be denied for the reason that they have not been timely made. To admit them at this time even though they have some legitimate cause for intervention would cause undue delay in the adjudication of this case.

Now, a lot has been said about the Grand Jury transcripts and the evidence there. I think there is a lot of misunderstanding, too. The mere fact that they have not been released, it is assumed by everybody to indicate that there is some mysterious amount of evidence in the hands of the Grand Jury that if ever released would be of great value to somebody, and the court is a part of a great conspiracy trying to keep this from being released.

It has been traditional in federal courts that Grand Jury proceedings be kept secret for at least two very apparent reasons. One is that the Grand Jury is permitted to delve into matters which but for public necessity would be an

invasion of privacy protected by the Constitution. Evidence so obtained must be kept secret in order to protect the innocent and must not be released unless a need therefor be shown of such a high order as would justify a court in overriding constitutional considerations.

A second reason for the secrecy is that witnesses appearing before the Grand Jury afford better cooperation and are more willing to testify with the knowledge that proceedings are secret.

Now, we have to clothe all Grand Jury proceedings with that aura if we are going to maintain a proper Grand Jury concept. The Supreme Court has been adamant that District Courts be very careful and be very reluctant to release Grand Jury transcripts of any kind in any case unless there is a need shown.

The order which has been prepared—and I have not had an opportunity to examine it carefully—but it is my intention to sign an order which—if this does not so provide, we will see that one does—will impound all of the testimony and all exhibits which have been presented to the Grand Jury so that they may not be destroyed or lost or dissipated. If these were to be released generally they would have to be released by the persons from whom they were obtained, and the only way they could be recovered would be by a subpoena. They would suffer the possibility of loss or destruction or mutilation. In order that this evidence be maintained and be available to treble damage claimants or anyone else who is interested in further litigation, all of this material will be impounded with the Department of Justice and will be available to any such claimant upon a proper showing.

Right now any request for the release of Grand Jury records will be premature. There has been no showing and there have been no arrangements made for their release.

But the details of the release and the conditions under which they can be released, I am sure, will be liberal enough to satisfy anybody who makes any reasonable demand.

That, I think, disposes of all motions to consolidate and the Grand Jury matter.

I did want to make one more comment. I have lost my notes, but I will make it anyway. In this case it has seemed to me—well, I just wanted to express again my appreciation in having all the members of the Bar here from various parts of the country who have appeared as friends of the court.

What I wanted to say at this point is—and I don't want to be misunderstood—it has been pretty clear to me ever since the issues were crystallized what the result would be. There have been some efforts made here by political interests, I feel, to make this court a useful court for their own purposes. This court as a result has been deluged with letters from good people, sincere people, throughout the United States who, I think, have been deluded to some extent as to the issues presented here. It is obviously an intent on the part of some politicians, I think, to divert the fire which—or, the heat which their own constituents have placed upon them and to attempt to exercise some pressure on this court. Now, pressure isn't new to a judge; we get used to it and simply ignore it. But this kind of pressure is not proper, and is inappropriate in a court of this kind where it is used in an attempt to influence the court to do something other than what the law requires them to do.

I resent the implication that this court is susceptible to that kind of influence. The decision I have come to is a decision which is based upon the law as I understand it to be, and I feel pretty certain that the decision which the court has reached is consistent with the law.

Thanks, all of you, for coming.

There being nothing further, the court stands adjourned.

Memorandum Opinion, November 7, 1969

[Caption Omitted]

This is an action brought by the United States of America charging that the defendants, Automobile Manufacturers Association, Inc.,; General Motors Corporation; Ford Motor Company; Chrysler Corporation; and American Motors Corporation have conspired with other motor vehicle manufacturers, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment. By way of relief, the plaintiff is seeking an order enjoining these defendants from continuing the alleged unlawful conduct.

After eight months of negotiation, the parties have agreed to settle this case upon terms and conditions embodied in the proposed consent decree now before this court for approval.

On September 11, 1969, the proposed decree was made public and all interested parties, including the State of California, County of Los Angeles, City of Los Angeles, and the Air Pollution Control District of the County of Los Angeles, were invited to express their views as to whether or not the consent decree should be approved. The United States reserved the right to withdraw from the stipulated judgment, however, at any time within thirty days after its submission in the event any objections brought to its attention might seem meritorious.

On October 28, 1969, after the thirty day period had expired, this court held an open hearing at which time all persons wishing to appear as amici curiae were permitted to voice their objections. Appearances have been made on behalf of many states, counties, cities, air pollution control districts, congressional groups, associations and interested individuals.

Petitions to intervene, as parties plaintiff, were filed by the County of Los Angeles; County of Santa Barbara; the Bay Area Air Pollution Control District; Air Pollution Control District of the County of Los Angeles; the State of New York; the State of Connecticut; the State of Maryland; the State of New Jersey; City of New York; American Civil Liberties Union; two aldermen from the City of Chicago; M. B. Grossman and S. J. Tamkin, plaintiffs in a class action now pending in this court; and William J. A. Sturtz. With the exception of petitioner Sturtz, all prospective intervenors sought intervention in order to assert treble damage claims.[1]

It has not been urged seriously, or if so, not convincingly, that these petitioners may intervene here as a matter of right, for it is well settled that treble damage claimants do not have an "interest" cognizable under Rule 24(a) F.R.Civ.P. in Government anti-trust actions seeking injunctive relief. *United States* v. *Blue Chip Stamp Company*, 272 F. Supp. 430 (C.D. Cal. 1967), aff'd sub nom. *Thrifty Shoppers Scrip Company* v. *United States*, 389 U.S. 580 (1968); *Commonwealth Edison Company* v. *Allis Chalmers Manufacturing Company*, 207 F. Supp. 252 (N.D. Ill. 1962) aff'd 315 F. 2d 564 (7th Cir. 1963); *United States* v. *Harper & Row Publishers, Inc.*, unreported opinion (N.D. Ill., E.D., Nov. 27, 1967), aff'd. sub nom., *City of New York* v. *United States*, 390 U.S. 715 (1968);[2] *United States* v. *Western Electric Co.*, 1968 CCH Trade Cases ¶ 72,415 (D. N.J., 1968), aff'd sub

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[1] Petitioner Sturtz sought intervention to compel the defendants to buy his smog device, alleging their previous failure to do so constituted an anti-trust violation.

[2] Here the Supreme Court affirmed a denial of intervention in a consent decree proceeding where the states and municipalities were seeking virtually the same relief as is being sought here, including an "asphalt clause", access to grand jury records and a summary of evidence.

nom. *Clark Walker and Sons, Inc.* v. *United States*, 392 U.S. 659 (1968); *United States* v. *Minnesota Mining & Manufacturing Company*, unreported opinion (N.D. Ill. E.D. Sept. 2, 1969); *United States* v. *Aluminum Company of America*, 41 F.R.D. 342 aff'd per curiam sub nom. *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457 (1967).[3]

It also seems clear that the intervenors are not entitled to permissive intervention. Rule 24(b) F.R.Civ.P. requires the court, in considering whether to allow permissive intervention, to consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties."[4]

The main goal of the intervenors here is to block the proposed decree in the hopes of compelling the parties to litigate this case to judgment. A favorable judgment could then be used as a basis for their own treble damage actions. In the alternative, they are seeking the inclusion of an admission of liability, commonly called an

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[3] But see *Cascade Natural Gas* v. *El Paso Natural Gas*, 386 U.S. 129 (1967). In this case, upon which intervenors heavily rely, the Supreme Court upheld intervention as a matter of right. But this was a case of divestiture in which the decree had a direct effect upon the intervenors. In any event, in the light of subsequent cases it now appears that that ruling is sui generis and must be limited to the facts of that case. *United States* v. *Western Electric Co.*, *supra*; *Hobson* v. *Hanson*, 44 F.R.D. 18 (D. D.C. 1968); 81 Harvard Law Review 356 at 406 (1967); *United States* v. *Aluminum Company of America*, *supra*; *Lupton Mfg. Co.* v. *United States*, *supra*; *United States* v. *Harper & Row Publishers, Inc.*, *supra*; *City of New York* v. *United States*, *supra*.

[4] Rule 24. Federal Rules of Civil Procedure.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) . . . or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"asphalt clause",[5] which would produce the same result. However, the defendants have made it clear that they would not consent to such a clause and if it were to be insisted upon, no settlement of the case would be possible.

To allow permissive intervention in this case would certainly delay and prejudice the adjudication of the original parties. Courts, generally, have consistently denied intervention under Rule 24 F.R.Civ.P. in Government anti-trust cases where the purpose is to defeat the entry of a consent decree. *United States* v. *Blue Chip Stamp Company, supra.*

All petitions for intervention should, therefore, be denied.

Prior to the institution of this action, the Government impaneled a grand jury to investigate charges that these defendants were engaging in anti-trust activities. After eighteen months, the grand jury was dismissed, without an indictment having been returned. However, during its investigation, a tremendous amount of evidentiary material was gathered together and reviewed and the testimony of many witnesses was obtained. It has been contended by many appearing here as amici curiae that the proposed decree should contain some provision releasing this material, as well as the transcript of the grand jury proceedings, from the cloak of secrecy tra-

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[5] An "asphalt clause" gets its name from a group of antitrust cases against defendants engaged in the asphalt business, wherein a consent decree containing an admission of liability was approved. *United States* v. *Allied Chem. Corp.*, 1961 Trade Cas. ¶ 69,923, at 77,641 (D. Mass. 1960); *United States* v. *Bituminous Concrete Ass'n., Inc.*, 1960 Trade Cas. ¶ 69,878 at 77,487 (D. Mass.); *United States* v. *Lake Asphalt & Petroleum Co.*, 1960 Trade Cas. ¶ 69,835, at 77,272 (D. Mass.). So far as the court is aware, such a clause had never been used before and has never been used since. Furthermore, its value is doubtful, for insistence upon it would, for all practical purposes, eliminate the possibility of settling anti-trust cases.

ditionally surrounding such proceedings, in order that it might become available to treble damage claimants. At the hearing, a proposed order was presented to the court, to which all parties have agreed and which this court has signed, requiring that all evidence obtained by the grand jury, as well as its own transcript, be impounded in the hands of the Justice Department, where it may be obtained by treble damage claimants, or others, by subpoena or other appropriate means, where good cause therefor can be shown. This appears to satisfy those making this contention.

Let us now turn to a consideration of the proposed consent decree.

Section 5(a) of the Clayton Act, after providing that a final judgment or decree in an anti-trust action brought by the Government may be used with prima facie effect in treble damage actions, expressly excepts from these provisions consent decrees entered in such actions. In so doing, it implicitly recognizes consent decrees as a means of terminating civil anti-trust actions brought by the Government, and their use has become a most effective technique in anti-trust enforcement. It is reported that between 70 and 75 per cent of all such Government cases are settled in this manner, which allows the Government to obtain a large measure of injunctive relief without tremendous consumption of the limited manpower and financial resources available to the Anti-trust Division.

The decision to settle an anti-trust case in this fashion, like the decision to commence it in the first place, is an administrative decision and is a part of the implementation of the general policy of the Executive branch of government. As such, it is not subject to review by this court.

This court does have the power to disapprove the proposed settlement, but its use requires the exercise of

discretion, based upon legal, as distinguished from administrative, considerations. For instance, the court should withhold its approval if the decree be unenforceable or if it should provide for relief not consistent with the prayer of the complaint. The court may properly consider whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree, on the whole, is against the public interest.

The proposed decree appears to be enforceable, and no contention to the contrary has been made. Furthermore, the relief which the decree provides is consistent with the prayer of the complaint.

It has been urged that the decree adversely affects the rights of treble damage claimants in this prosecution of their own claims. But, while it is true that the decree does not afford prima facie proof of liability, the rights of the claimants to prosecute their own claims is not otherwise affected. We know of no authority, and none has been brought to our attention, which would require the Government to prosecute this case to judgment solely for the purpose of aiding treble damage claimants. The Government is the designated representative of the public, and sound policy requires that it be free to conduct and control its litigation in the public interest. This objection to the decree is not valid.

It is strongly urged by many that the decree should be rejected as not being in the public interest. But no good reason appears to this court for finding this to be so. In the first place, it provides the Government with substantially all the relief that it could have obtained if it had tried the case and won. It avoids the tremendous expense of time and money which would be required of the Anti-trust Division in the event of a trial. The decree brings immediate results, whereas if this case were to be tried, any benefit of a final decree would be delayed many years. It brings an assured result. Those objecting

have all assumed that the Government would win the action if it were brought to trial. But the Government's case is based upon a novel and unadjudicated theory. Knowledgeable people disagree as to the final result. If the Government should try this case and lose, the benefits of the decree would be lost. For these reasons, it appears to the court that the proposed decree is in the public interest.

For the foregoing reasons, all petitions to intervene, as parties, are hereby denied and the proposed consent decree is hereby approved.

DATED: November 7, 1969.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX B—STATUTES INVOLVED

Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), provides:

> A final judgment or decree heretofore or hereafter entered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

Rule 24 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

APPENDIX C—COMPLAINT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 69-75-JWC

Filed: 1/10/69

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.;
GENERAL MOTORS CORPORATION;
FORD MOTOR COMPANY;
CHRYSLER CORPORATION; and
AMERICAN MOTORS CORPORATION,
Defendants.

Complaint

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendants named herein, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, as amended, (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act.

2. Each of the corporate defendants named herein transacts business and is found within the Central District of California.

II

Defendants

3. Automobile Manufacturers Association, Inc., a corporation organized and existing under the laws of the State of New York with its principal place of business in Detroit, Michigan, is made a defendant herein. Automobile Manufacturers Association, Inc., is a trade association whose membership consists mainly of firms engaged in the business of manufacturing and selling motor vehicles and component parts and accessories thereto in various states of the United States.

4. The Corporations named below are made defendants herein. Each of said corporations is organized and exists under the laws of the State indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint said defendants have primarily engaged in the business of manufacturing and selling motor vehicles in various states of the United States, and also manufacture and sell component parts and accessories thereto.

Defendant Corporation	*State of Incorporation*	*Principal Place of Business*
General Motors Corporation	Delaware	Detroit, Michigan
Ford Motor Company	Delaware	Dearborn, Michigan
Chrysler Corporation	Delaware	Highland Park, Michigan
American Motors Corporation	Maryland	Detroit, Michigan

5. Whenever in this complaint reference is made to any act, deed or transaction of a corporate defendant, such allegation shall be deemed to mean that said corporation engaged in said act, deed or transaction by or through its officers, directors, agents or employees while they were actively engaged in the management, direction or control of corporate business affairs.

III

Co-Conspirators

6. Each of the corporations listed below in this paragraph is not named a defendant herein but is named as a co-conspirator and has participated as a co-conspirator with the defendants in the offense hereinafter charged and has performed acts and made statements in furtherance thereof.

Corporation	*State of Incorporation*	*Principal Place of Business*
Checker Motor Corporation (successor to Checker Cab Manufacturing Corporation)	New Jersey	Kalamazoo, Michigan
Diamond T Motor Car Company	Illinois	Cleveland, Ohio
International Harvester Company (a consolidation of International Harvester Company, a New Jersey Corporation, and International Harvester Corporation, a Delaware Corporation)	Delaware	Chicago, Illinois
Studebaker Corporation (successor to Studebaker-Packard Corpoitation)	Michigan	South Bend, Indiana
White Motor Corporation (successor to The White Motor Company)	Ohio	Cleveland, Ohio
Kaiser-Jeep Corporation (successor to Willys Motors, Inc., a Pennsylvania Corporation)	Nevada	Oakland, California
Mack Trucks, Inc. (successor to Mack Manufacturing Corporation)	New York	New York

7. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the offense charged in this complaint and have performed acts and made statements in furtherance thereof.

IV

Definition

8. As used herein, the term "motor vehicle air pollution control equipment" means equipment, or any part thereof, designed for installation on a motor vehicle or any system

or engine modification on a motor vehicle which is designed to cause a reduction of pollutants emitted from the vehicle, including, but not limited to, any device for the control of emissions of pollutants from the exhaust system, the crankcase, the carburetor, or the fuel tank.

V

Trade and Commerce

9. Automobiles for the most part are manufactured in the State of Michigan and are shipped therefrom to each of the fifty states of the United States. Some automobiles are assembled in various states of the United States from parts manufactured in the State of Michigan and other states. In 1966, 78,315,000 passenger cars and 15,864,000 trucks and buses, exclusive of off-the-road vehicles, were registered in the United States. In that year, 8,604,712 passenger cars valued at more than $17½ billion and 1,791,587 commercial vehicles valued at more than $3.9 billion were produced in this country. Of the trucks produced, 96,560 were built with diesel motors.

10. The largest number of passenger cars registered and new cars sold in any state of the United States in 1966 was in the State of California where 7,621,792 cars were registered and 832,338 new cars sold. The largest number of passenger cars registered in any county of any state in the United States in 1966 was in Los Angeles County where 2,932,980 cars were registered. Similarly, in 1966 California accounted for the largest number of truck registrations and new truck sales with 1,542,984 trucks registered and 150,927 new trucks sold, and Los Angeles County accounted for the largest number of trucks registered, numbering 436,218.

11. Since at least 1952 it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminants. For example, in Los Angeles County, as of January 1967, gasoline-powered motor vehicles

accounted for 12,465 tons out of a total of 14,610 tons, or 85.3% of contaminants emitted into the ambient air daily. As a result of new and continuing requirements that automotive vehicles be equipped with air pollution control devices, a large and growing market for the production and installation of such devices has developed. Motor vehicle air pollution control devices are shipped in interstate commerce either as engine or system modifications or as equipment attached to automobiles, which are shipped from Michigan and other states to each of the fifty states of the United States.

VI

Offense Alleged

12. Beginning at least as early as 1953, and continuing thereafter up to and including the date of this complaint, the defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

13. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are:

(a) to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(b) to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and

conspired to do, including, among other things, the following:

(a) agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

(b) agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and to require "most-favored-purchaser" treatment of all parties to the cross-licensing agreement if any one were licensed by a person not a party to that agreement;

(c) agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment:

(1) in 1961 the defendants agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this antipollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) in late 1962 and extending into 1963, the defendants agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory;

(3) in early 1964 the defendants agreed among themselves to attempt to delay the introduction of

new exhaust pollution control measures on motor vehicles sold in California until the model year 1967; despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust antipollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automotive industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966; and

(d) agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

VII

Effects

15. The aforesaid combination and conspiracy has had, among others, the following effects:

(a) hindering and delaying the research, development, and manufacture both by the defendants and co-conspirators and by others not parties to the agreements alleged herein and the installation of motor vehicle air pollution control equipment;

(b) restricting and suppressing competition among the defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(c) restricting and suppressing competition in the purchase of patents and patent rights covering motor vehicle air pollution control equipment.

Prayer

Wherefore, the plaintiff prays:

1. That the Court adjudge and decree that the defendants have engaged in a combination and conspiracy, in un-

reasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Sherman Act.

2. That each of the defendants named in this complaint, its successors, assignees and transferees, and the respective officers, directors, agents and employees thereof, and all persons acting or claiming to act on behalf thereof:

(a) be enjoined from continuing, maintaining or renewing, directly or indirectly, the combination or conspiracy hereinbefore alleged, or from engaging in any other practice, plan, program, or device having a similar effect;

(b) be enjoined from entering into any agreements, arrangements, understandings, plan or program with any other person, partnership or corporation, directly or indirectly:

(1) to delay installation of air pollution control equipment or otherwise restrain individual decisions as to installation dates;

(2) to restrict individual publicity of research and development relating to air pollution control technology;

(3) to require joint assessment of the value of patents or patent rights relating to air pollution control equipment;

(4) to require that acquisition of patent rights relating to air pollution technology be conditioned upon availability of such rights to others upon a most favored purchaser basis; or

(5) to respond jointly to requests by government regulatory agencies for information or proposals concerning air pollution control technology unless such agency requests a joint response in a particular case; and

(c) be required to issue to any applicant interested in developing motor vehicle air pollution technology, unrestricted, royalty-free licenses and production know-how under all United States patents owned, controlled or applied for to which the cross-licensing agreement dated July 1, 1955, as amended, has been applicable, and to make available to any such applicant all other know-how related to air pollution control technology which has been exchanged with any other defendant.

3. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises, including cancellation of the cross-licensing agreement dated July 1, 1955, as amended, and an injunction ensuring that all future joint arrangements relating to air pollution control technology be appropriately limited as to subject matter of joint effort and numbers of participants so as to maintain competition in the development of air pollution technology.

4. That the plaintiff recover the costs of this suit.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 1122

MARSHALL BLOOMSMAN and S. JEROME TAMKIN, Ph.D., individually, and on behalf of all others similarly situated,

Appellants,

vs.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION, and UNITED STATES OF AMERICA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

October Term, 1969

No.

MARSHALL B. GROSSMAN and S. JEROME TAMKIN, D.D.S., individually and on behalf of all others similarly situated,

Appellants,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION, and UNITED STATES OF AMERICA,

Appellees.

On Appeal From the United States District Court for the Central District of California

JURISDICTIONAL STATEMENT

substantial legal questions affecting the health and well being of the American public are presented.

Opinion Below.

The judgment of the District Court for the Central District of California is reported in C.C.H. Trade Cases Para. 72,907 (1969). The Court's Memorandum Opinion is unreported. Copies of the judgment and opinion are attached hereto as Appendices A and B respectively.

Jurisdiction.

The United States' action was brought to obtain a declaration that defendants-appellees were in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1), to enjoin them from pursuing various actions in violation thereof, and for general relief. On September 17, 1960, appellants filed a national class action on behalf of the American public under Rule 23 of the Federal Rules of Civil Procedure against the same defendants-appellees pursuant to Section 4 of the Clayton Act (15 U.S.C. Section 15), alleging in material part a violation of Section 1 of the Sherman Act, and seeking injunctive, treble damage, and general relief. Similar actions have been filed by numerous states, local governments and private citizens. They are now docketed (#31) before the Judicial Panel on Multidistrict Litigation of the United States Courts.

Appellants moved the District Court to disapprove the proposed Consent Judgment and to allow consolidation of the two actions under Rule 42(a) of the Federal Rules of Civil Procedure. On October 29, 1969, the District Court entered an order approving the Stipulation for Entry of Consent Judgment, entered judg-

ment thereon, and denied appellants' motion to consolidate. Notice of appeal to this Court was filed in the District Court on December 15, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 15 U.S.C. Section 29, commonly known as the "Expediting Act". The following decisions sustain this direct appeal to the Supreme Court: *Utah P. S. Com. v. El Paso Nat. Gas Co.*, ... U.S. ....., 23 L. Ed. 474 (1969); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944); *United States v. California Co-op Canneries*, 279 U.S. 553 (1929); and *Missouri-Kansas Pipe Line Co. v. United States*, 108 F. 2d 614 (3rd Cir. 1939), *cert. denied* 309 U.S. 687 (1940).

Questions Presented.

1. Where a District Court is requested to approve a proposed antitrust consent decree of critical public concern, does the hearing thereon and subsequent final judgment meet the requisites of due process of law if notice of the hearing is ordered given only to a modicum of the persons adversely affected.

2. Where a District Court is requested to approve a proposed antitrust consent decree of critical public concern, does due process require that adversely affected persons be permitted to cross-examine parties and witnesses and to inspect documents material to the subject matter of the proposed consent decree.

3. Where a consent decree is proposed involving highly complex issues of critical public concern, may the Court approve the decree and enter final judgment

thereon without presentation for its consideration of any evidence or facts sufficient to enable the Court to determine if the proposed decree is fair, equitable and in the public interest.

4. Where the enforcement policy underlying the provisions of Section 4 of the Clayton Act would be significantly frustrated by entry of judgment upon a proposed consent decree, should entry of judgment be conditioned upon the inclusion of a provision in the decree providing for a limited admission by the defendants of the allegations in the government complaint, for the sole purpose of giving such judgment the *prima facie* effect in subsequent private actions provided in Section 5(a) of the Clayton Act (15 U.S.C. Section 16(a)).

5. Where two suits are pending before the District Court involving identical and complex issues of significant public importance, and where separate trials of these issues would create unnecessary duplicity of time and expense, does a District Court abuse its discretionary powers in denying a motion to consolidate them under Rule 42(a) of the Federal Rules of Civil Procedure.

Statutes Involved.

15 U.S.C. Sections 1, 15, 16(a). The full text of these statutes is attached hereto as Appendix C.

Statement of the Case.

In mid-1966, a Federal Grand Jury commenced investigation of the practices of the automotive industry regarding possible anti-competitive practices in the failure to develop automotive anti-pollution devices. As a

result of the evidence assembled by the Grand Jury over an eighteen month period, the United States, on January 10, 1969, filed a civil complaint charging that defendants-appellees General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation and Automobile Manufacturers Association had violated Section 1 of the Sherman Act by conspiring to eliminate competition in the research, development, manufacture and installation of automotive air pollution control equipment, and in the purchase of patents and patent rights covering such equipment.

Automobiles are shipped to each of the fifty states of the United States. In 1966, for example, 78,315,000 passenger cars and 15,864,000 trucks and buses, exclusive of off-the-road vehicles, were registered in the United States. In that year, 8,604,712 passenger cars valued at more than $17½ billion and 1,791,587 commercial vehicles valued at more than $3.9 billion were produced in this country. These figures have each increased in each succeeding year.

Since at least 1952 it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminants. For example, in Los Angeles County, as of January 1967, gasoline-powered motor vehicles accounted for 12,465 tons out of a total of 14,610 tons, or 85.3% of contaminants emitted into the ambient air daily.[1] A large and growing market for the production and installation of air pollution con-

[1]65 million tons of deadly carbon monoxide are discharged each year by automobiles in this country. PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION, FIRST REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE TO THE UNITED STATES CONGRESS, June 28, 1968, at 16.

trol devices has developed. Such devices are shipped in interstate commerce either as engine or system modifications or as equipment attached to automobiles.

Beginning at least as early as 1953, and continuing to the date of the filing of the United States' action, the defendants-appellees and co-conspirators were engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment. The combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, namely:

(a) To eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and.

(b) To eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

In furtherance of that conspiracy, defendants-appellees did the following:

(a) Agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

(b) Agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and to require "most-favored-purchaser" treatment of all parties to the cross-licensing agreements if any one were licensed by persons not a party to that agreement;

(c) Agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment:

(1) In 1961 defendants-appellees agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this anti-pollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) In late 1962 and extending into 1963, defendants-appellees agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory;

(3) In early 1964 defendants-appellees agreed among themselves to attempt to delay the introduction of new exhaust pollution control measures on motor vehicles sold in California until the model year 1967; despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust anti-pollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automobile industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966; and

(d) Agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

The aforesaid combination and conspiracy has had, among others, the following effects:

(a) Hindering and delaying the research, development, and manufacture—both by the defendants and co-conspirators and by others not parties to the agreements—and the installation of motor vehicle air pollution control equipment;

(b) Restricting and suppressing competition among the defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment.

The foregoing facts are alleged in the United States' complaint.

The closed door and nefarious conduct complained of was characterized by counsel for the defendants-appellees at the evidence—and fact-free hearing for approval of the proposed consent decree as follows:

> "Basically, the conduct evolves around cooperative efforts of the automotive industry as an industry to develop methods and equipments for reducing the level of objectionable emissions from motor vehicles in response to the urging of the California officials to reduce the impact of motor vehicle emission on smog.
>
> "This case does not involve, your Honor, any sinister form of combination or conspiracy. On the contrary, what is involved is an open and public forum of industry cooperation known to all regulatory bodies, a fact which we believe the court can take judicial notice of." [Transcript, pp. 27-28.]

Defendants-appellees were never required to plead to the United States' complaint. On September 11, 1969 there was filed in the District Court a proposed final judgment together with a Stipulation that judgment could be entered after 30 days unless the United States withdrew its consent before the expiration of that period. On its own motion, by order dated September 17, 1969, the District Court invited all interested persons to express their views on the proposed consent decree and ordered that a hearing be held on October 28, 1969. However, the District Court ordered copies of this order sent only to the parties to the United States' action, the California Attorney General, the Los Angeles County Counsel, the Los Angeles City Attorney, and the Los Angeles Air Pollution Control District. No other notice of the hearing was ordered given, served or published and the aforesaid notice was not ordered published at all.

On September 17, 1969, appellants Marshall B. Grossman and S. Jerome Tamkin, Ph.D., individually and on behalf of all United States residents, filed a separate complaint against defendants-appellees in the same District Court. This complaint and the complaint filed by the United States alleged like acts and violations on the part of defendants-appellees. To avoid the expense and delay of proceeding separately with these two suits, appellants Grossman, *et al.*, filed a motion for consolidation of these two cases under Rule 42(a) of the Federal Rules of Civil Procedure in October, 1969, together with their objections to entry of the proposed consent judgment.

Others also filed objections of the proposed consent decree and some filed applications to intervene. Only

one comment supporting the decree was filed. In addition, many letters were directed to the Court pleading for disapproval of the decree.

On October 28, 1969, the hearing, as ordered, was held, at which time the Court announced its decision approving the consent decree and denying the motions to intervene and consolidate. At the hearing, neither the United States nor the defendants-appellees introduced or presented any evidence or facts. They called no witnesses. They did not summarize the substantive contentions of the United States or the defendants-appellees. They did not advise the Court what evidence supported their respective positions. Appellants requested and were denied the opportunity of cross-examining the parties and inspecting relevant and material documents.

Judgment was entered on October 29, 1969, together with an order impounding certain of the documents gathered by the Federal Grand Jury in its investigation of the defendants.

Appellants filed a notice of appeal to this Court under the Expediting Act (15 U.S.C. Section 29) on December 15, 1969.

The Questions Are Substantial.

The subject matter of this appeal is perhaps of greater potential effect upon the lives and well being of all persons within this country than any other litigation in this century. We are here concerned with the intentional polluting and poisoning of air. According to the charges of the United States' complaint, the defendants-appellees have combined and conspired in such a manner as to insure the continuing pollution of the atmosphere. The effects upon the American people have

been staggering. The one essential ingredient of life, air, has become impregnated with visible and invisible poisons. Our children are herded into cafeterias and gymnasiums during "smog alerts". Their ability to partake of the pleasures of childhood is stifled. The well get sick and the aged and infirm become ill and die. Travel throughout the country is less enjoyable and less pleasurable as one journeys from smog belt to smog belt. And all the while, unbeknown to but a few Americans, the executives of one of our largest industries were combining and conspiring to perpetuate the evil for their own pecuniary self gain.

Presented with the basic information and facts, the District Court might have felt impelled to reject the proposed consent decree and either require different terms as a condition to approval, such as remedial relief, that the parties proceed to trial. Yet the parties saw fit to present the Court with no evidence, no facts, no contentions. In short, the Court was left in the dark and had before it only the government's complaint, the proposed consent decree, and the arguments of persons who were generally uninformed on the merits.

The defendants-appellees were permitted a settlement consisting of little more than a promise "never to do it again" in light of at least the following facts:

(1) The conspiracy and combination was persisted in for sixteen years;

(2) The conspiracy reflected a callous disregard for the health and well being of human beings;

(3) The conspirators secreted from the public and government agencies information respecting the development of anti-pollution devices and affirmatively misrepresented their claimed inability to proceed in the development of same;

(4) The defendants-appellees rank among the elite of American industry in power, economic strength, and influence; and

(5) The proposed consent decree requires no remedial action.

When a consent decree is proposed in a matter of such great moment, surely due process requires that adequate notice of the hearing be given to those persons directly affected and that those persons be permitted the opportunity to cross-examine parties and witnesses and inspect documents material to the subject matter of the proposed consent decree. Each of these rights was requested. None of them were granted. And neither the Court nor the parties to the action bothered to address themselves to these serious and basic constitutional questions.

By reason of the systematic silence of the appellees and the emptiness of the record, the District Court was stripped of its ability to independently exercise its judicial duty of determining whether the proposed consent decree was fair, equitable and in the public interest.

Given the life and death importance of this litigation, the District Court had a duty to the public not to allow itself to be unduly bound by a simple agreement between the parties. Nevertheless, the Court below was of the opinion that air pollution was

> ". . . simply not a problem which the Courts can deal with, and this action today has nothing to do with correcting smog. As a matter of fact, there is nothing I can do in this case that would have any direct or profound effect upon smog whatsoever." [Transcript, p. 9].

The Notice of Hearing and the Hearing Itself Failed to Meet the Standard of Due Process of Law.

In *Mullane v. Central Hanover B & T Co.*, 339 U.S. 306 (1950), this Court stated that:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' (Citations.) This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appeal or default, to acquiesce or contest." *Id.* at 314.

The appellees did not even request that a hearing be held upon the proposed consent decree. The District Court, however, set a hearing. However, notice of the hearing was given only to the parties in the United States' action, to the California Attorney General, the Los Angeles County Counsel, the Los Angeles City Attorney, and the Los Angeles Air Pollution Control District.

Local and state governments and individuals with rights which would be adversely affected by a consent decree should have received notice under Court supervision. The consent decree effectively strips those suffering damages from the conspiracy of the *prima facie* effect of judgment as provided in Section 5(a) of the Clayton Act (15 U.S.C. Section 16(a)).

The Department of Justice did not even follow its own policy of obtaining the views of all parties affected by the proposed consent judgment:

> "(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws *only after or on condi-*

tion that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to the entry of such proposed judgment by the Court." (Emphasis added.), 28 C.F.R. Section 50.1.

Analogy may be made to the mandatory/discretionary notice requirements for class actions brought under Rule 23 of the Federal Rule of Civil Procedure. The Advisory Committee's note to Rule 23 indicates the reason for notice requirements in representative type actions:

> "This mandatory notice pursuant to Subdivision c(2), together with any discretionary notice which the Court may find it advisable to give under Subdivision d(2), is designed to fulfill requirements of due process to which the class action procedure is, of course, subject."

In recent Federal Court decisions, it has been held that even the discretionary notice provisions under F.R.C.P. 23(b) must comport with due process of law. In *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968), the Court in discussing the discretionary notice requirement held that:

> ". . . notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Id.* at 564-565.

and that

> ". . . the procedure adopted must conform to the requirements of due process and fairly insure the

protection of absent parties who are to be bound. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Notice as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 568.

See also: *Cranston v. Freeman*, 290 F. Supp. 785 (N.D. N.Y. 1968) at 787; *Clark v. American Marine Corporation*, 297 F. Supp. 1305 (E.D. La. 1969) at 1306; and *Herbst v. Able*, 47 F.R.D. 1 (S.D.N.Y. 1969) at 22.

Even those who received notice and appeared at the hearing were denied the effective opportunity to be heard. They were stripped of all ability to inform themselves or to assist the Court in informing itself. They were denied the right to cross-examine and inspect documents.

The District Court Erred by Not Requiring a Showing That the Proposed Consent Decree Was Fair, Equitable and in the Public Interest.

No consent decree should be approved unless it is established to the satisfaction of the Court that it is fair, equitable, and in the public interest.

Appellees successfully barred the introduction of *any* evidence at the hearing by arguing that such evidence would remove any consent decree from the proviso to Section 5(a) of the Clayton Act regarding the non-*prima facie* effect of consent decrees entered "before any testimony has been taken. . . ." (Defendants' Opposition to Applications for Leave to Intervene and

Other Petitions and Comments Regarding the Proposed Decree, and Memorandum of Points and Authorities, p. 26). However, as appellants argued below;

> ". . . the only logical way that provision can be read is to read it with reference to testimony on the merits of the cause and certainly not testimony which may be adduced to help make the bench better informed as to whether or not the settlement which is proposed is fair, reasonable and adequate." [Transcript, pp. 146-147].

Appellees argued that because the proposed consent decree allegedly provided for substantially all the relief expressly asked for by the government in its complaint, the decree should be approved. Yet, as pointed out by appellants, the government's complaint also requested "such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises." (United States Complaint, p. 10, lines 11-13). [Transcript, p. 149, lines 6-13]. By reason of this prayer the Court, after observing the gravity of the appellees' violations during trial, could have decreed any further equitable relief necessary to adequately meet the magnitude of the violations. For example, the Court could have required the defendants-appellees to recall and equip those cars manufactured during the period of the conspiracy with adequate air pollution control devices at their expense. Nevertheless, the District Court judge was of the opinion that

> "The prayer for such relief as may seem proper is a general catchall clause, as all attorneys know, and it means little if anything." [Transcript, p. 162, lines 6-8].

In *United States v. Ward Baking Co.*, 376 U.S. 327 (1964), the complaint also contained a prayer for general relief. After consent decree negotiations, the defendants submitted a proposed consent decree and the District Court ordered the government to show cause why the proposed judgment should not be entered. The government urged the inclusion of two additional injunctive relief provisions. The District Court was of the opinion that the proposed judgment provided all the relief to which the government would be entitled were a decree entered after trial, and approved the proposed consent decree. In vacating the judgment of the District Court this Court stated:

> ". . . it cannot reasonably be assumed that the government could not, at the trial, have introduced evidence justifying, in whole or in part, the relief sought.[3] This is not to say, of course, that the District Court could not correctly have concluded, *after trial and an 'opportunity to know the record and to appraise the need for prohibitions or affirmative actions.' United States v. United States Gypsum Co., supra*, 340 U.S. at 89, 95 L.Ed. at 101, that the requested relief was not warranted. Under the circumstances of this case, however, it could not so conclude without a trial.
>
> [3]The disputed provisions certainly may be regarded as within the general scope of the relief sought in the complaint, which included a request for 'such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.' It should be noted in this regard that the companies did accede to a number of government de-

> mands which went beyond the violations charged or the specific relief requested." *Id.* at 332-333 (Emphasis added.)

The *Ward* case makes it clear that a prayer for general relief cannot be ignored in comparing the provisions of a proposed consent decree with those of a complaint in determining the adequacy of relief granted by the consent decree. Moreover, *Ward* is support for appellants' contention that the District Court committed error in not allowing itself, in the words of the Court, "an opportunity to know the record and to appraise the need for prohibitions or affirmative actions".

The District Court had the power to reject the proposed consent decree.

In *United States v. Blue Chip Stamp Company*, 272 F. Supp. 432 (C.D. Calif. 1967), the Court, after a hearing, refused to sign a proposed consent decree. In *United States v. Pan American World Airways, Inc.*, 1959 C.C.H. Trade Cases, Para. 75,138 (S.D.N.Y. 1959), the Court would not approve a proposed consent decree and ordered the parties to trial. In *United States v. F. & M. Schaeffer Brewing Company and Anheiser Busch, Inc.*, 1968 C.C.H. Trade Cases, Para. 72,345 (C.D.N.Y. 1967), the Court recognized the judicial function of the Court when a consent decree had been offered and new parties objected to it, and then set the matter for a hearing:

> "[A]s a judicial act, the consent decree constitutes the determination by the Court that its content is equitable and in the public interest. * * * Report

of the Antitrust Subcommittee (Sub. Comm. No. 5) of the Committee on the Judiciary, H.R. 27, 86th Cong., 1st Sess., Consent Decree Program of the Department of Justice, January 30, 1959 at p. 3." *Id.* at p. 84,940.

In *United States v. First National Bank and Trust Company of Lexington, Kentucky,* 280 F. Supp. 260 (E.D. Ky. 1967), Chief Judge Swinford when faced with an analogous situation in an antitrust case of essentially local concern, stated:

> "I do not question the right of the United States or any other public agency to compromise litigation in which it is involved, but I do believe that the United States should go very slowly in cases of this character where the whole community, comparatively small though it may be, is deeply concerned. . . . Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind. American justice is so constituted that not only should it be fair and impartial but the litigants and the public should know that it is fair and impartial." *Id.* at 263.

In *Esco Corporation v. United States,* 340 F. 2d 1000, (9th Cir. 1965), Judge Barnes, who was once in charge of the Antitrust Division, wrote:

> "While a consent decree, forged by agreement between private and government attorneys, may not be a product of the trial judges own effort, it must be scrutinized carefully and approved, both as to form and content, by the court entering it, prior to such entry." *Id.* at 1005.

In *United States v. Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), appeal dismissed 318 U.S. 796, Circuit Judge Maris wrote:

> "A consent decree although based upon agreement of the parties rather than a finding of facts by the court, is not a mere authentication or recording of that agreement. It is a judicial act (*United States v. Swift & Co.*, 286 U.S. 106, 115, 52 S. Ct. 460, 760 L. ed. 999) and, therefore, involves the determination by the chancellor that it is equitable and in the public interest. The fact that the Court may consider the opinion of the Department of Justice to the same effect does not mean that the Court has abdicated its power, or failed to carry out its responsibility, to make an independent determination of the propriety and equity of the decree proposed by the parties. . . . It is fundamental to our form of government that in such suits, as in all other matters brought before them for judicial action, the Court must act 'in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the government.' *Irvine v. Marshall*, 61 U.S. 558, 567, 20 How. 558, 15 L. ed. 994." *Id.* at 655.

In *United States v. Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962), when the Court was called upon to sign a consent decree between the government and one of two defendants charged with violating the antitrust laws, Judge Weinfeld made the following observation:

> "In passing upon the joint application of the Government and Carter for approval of their stipulation, the Court performs a judicial function and

> is called upon to decide whether it is equitable to enter the decree as proposed by them or with necessary modification to effectuate its basic purpose. While the public interest is a dominant consideration, the rights of third parties may not be ignored." *Id.* at 147-148.

These authorities establish the independent function which the District Court in this case was called upon to perform. The Court had to do justice between the parties to the action, as well as every man, woman and child who suffered during the sixteen year conspiracy. To accomplish such a formidable task within the structures of due process of law, the Court had to insure that it was presented with a record sufficient to inform it of all relevant facts upon which it could intelligently make the determination it was asked to make.

For example, the Court was not advised whether the proposed injunction would terminate conduct *then* being engaged in. In fact, the defendants'-appellees' brief in support of the settlement implied that the conduct complained of (after its sixteen year history) was no longer being engaged in. (Defendants' Opposition to Application for Leave to Intervene, Etc. p. 19). Further, the government at no time expressed its opinion of its potential for success on the merits. The government's brief in support of the settlement, however, contains the candid admission that "As a practical matter, access to the documentary evidence obtained by the Government in its investigation of this case may well prove to be nearly as helpful as an adjudication of violation." (Government's Response to Applications for Intervention, Etc., p. 22, lines 1-5). Did the Court, therefore, accept a consent decree consisting of a promise not to engage

in conduct previously engaged in for sixteen years, but not then being engaged in, in the face of government possession of documentary evidence sufficient to clearly establish liability on the part of the defendants?

The question before the Court was a judicial event of such magnitude, having such far-reaching consequences for American society, that the bare record before the Court was entirely inadequate and could not justify approval of the proposed consent decree.

The District Court Erred by Approving the Consent Decree in Its Proposed Form Without Inclusion of a Limited Admission of the Allegations in the Complaint as a Condition to Approval.

In objecting to entry of judgment on the consent decree as proposed, appellants, and others, requested the inclusion of a provision in the consent decree in which the defendants make a limited admission of the allegations in the government complaint. In rejecting this proposal the District Court seemed to be concerned more with settlement of the pending action than with protection of the public interest:

> "However, the defendants have made it clear that they would not consent to such a clause and if it were to be insisted upon, no settlement of the case would be possible. * * * [The value of such a clause] is doubtful, for insistence upon it would, for all practical purposes, eliminate the possibility of settling antitrust cases." [Memorandum Opinion, p. 4, lines 5-8, 29-32].

This overriding concern for the protection of the settlement mechanism does not give adequate consideration to Congressional antitrust enforcement policy for the protection of the public.

Congress envisaged both government and private actions to achieve the broad social object of the statute. *New Jersey Woodfinishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F. 2d 346 (3rd Cir. 1964) at 350-351, aff'd. 381 U.S. 311 (1965); *United States v. Cooper Corp.*, 312 U.S. 600 (1941) at 608-610; *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955) at 365; see also MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bull. 113 (1962).

This Court has recognized the Congressional intent to ". . . use private self-interest as a means of enforcement of the antitrust laws". *Bruces Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947) at 751, and that private parties were to receive the benefits of prior government suits. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311 (1965) at 317-318; *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951) at 566-568; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) at 784-785, aff'd. in part, reversed in part, 392 U.S. 481 (1968); *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F. Supp. 540 (E.D. Penn. 1967) at 542; *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963) at 834.

The historic intent of Congress to utilize private suits as a method of achieving effective antitrust compliance was well expressed by President Woodrow Wilson in 1914 when he urged Congress to facilitate the interaction of private and government actions by:

> ". . . giving private individuals who claim to have been injured by these processes the right to found

> their suits for redress upon the facts and judgments proved and entered in suits by the government where the government has upon its own initiative sued the combinations complained of and won its suit . . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the government has command of. Thus, shall individual justice be done while the processes of business are rectified and squared with the general conscience." Woodrow Wilson, "Special Address Delivered at a Joint Session of Congress" January 20, 1914, Messages and Papers of the Presidents, Volume XVI, Bureau of National Literature, Inc., p. 7918.

In 1955, Congressman Wright Patman echoed President Wilson's statement when he stated to the House Antitrust Subcommittee:

> "We have recognized that a necessary and integral part of any such policy is full and effective enforcement of our anti-monopoly laws. For many years it has been recognized that the government alone is not able to provide all the necessary enforcement. The help of all citizens is needed. We know that private parties will help in this endeavor if we afford them rightful opportunity." Statement of Representative Wright Patman before the Antitrust Subcommittee of the Committee on Judiciary, House of Representatives on H.R. 10243, August 6, 1958.

The Senate Committee Report on Proposed Amendments to Section 5 of the Clayton Act also emphasized

the need for the joint effort of the government and private litigants as an antitrust enforcement weapon:

> "The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act. . . .
>
> Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful government action, so that the judgments and decrees and the Federal proceedings could be used to establish a case. Amassing evidence for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." (S. Rep. No. 619, 84th Congress, 1st Session, June 21, 1955; U.S. Code Cong. & Ad. News (1955) at 2329.

In *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), this Court examined the history of the policy of assisting private litigants by prior government action:

> "Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress 'agree in giving private individuals . . . the right to found their (antitrust) suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has . . . sued the combinations complained of and won its suit.' . . .' 51 Cong. Rec. 1964. Congressional reports and debates on the proposal which ultimately became Section 5 reflect the purpose to minimize the burdens of litigation

> for injured private suitors by making available to them all matters previously established by the government in antitrust actions. . . ." *Id.* at 567-568.

In *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963) the Court discussed the policy of the antitrust laws with respect to private treble damage actions:

> "The purpose of Section 4 of the Clayton Act, Title 15, U.S.C. Section 15, which provides for private triple damage suits is 'to enlist "the business public . . . as allies of the government in enforcing the antitrust laws;" the means chosen, on the other hand, is to give the "injured party ample recompence for the wrong suffered" by allowing three-fold recovery of damages.' Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 378 (1955). In other words, the private antitrust suit is a substantial weapon in effectuating a national policy of protecting, preserving and promoting free competition in the market place by blending 'antitrust policy with private compensatory law.' " 215 F. Supp. at 834.

Three Assistant Attorneys General in charge of the Antitrust Division (two of them while in office) in articles and testimony before Congressional committees, have stated that private actions are a desirable and necessary supplement to government enforcement efforts. See Bicks, The Department of Justice and Private Treble Damage Actions, 4 Antitrust Bull. 5 (1959) at 8; Loevinger, Private Action—The Stongest Pillar of Antitrust, 3 Antitrust Bull. 167 (1958) at 168; Statement of Lee Loevinger, Hearings Before Subcommittee

of the Select Committee on Small Business, U.S. Senate 85th Congress, 2nd Session (1958), pp. 7, 16; Comment, Antitrust Enforcement by Private Parties: Analysis of the Developments in the Treble Damage Suit, 61 Yale L.J. 1010 (1952) at 1046, quoting testimony of H. Graham Morrison, Hearings on H.R. 3408, Subcommittee on Monopoly Power of the House Judiciary Committee, p. 12.

Richard W. McLaren, the present Assistant Attorney General in charge of the Antitrust Division, stated on December 11, 1969:

> "Private antitrust proceedings today are not merely a means of compensating victims of antitrust conspiracies; they provide a substantial and meaningful deterrent to violations of the antitrust laws. Indeed, until the Congress acts on our recommendation to increase the maximum Sherman Act fine for corporations from $50,000 to $500,000, the treble-damage action provides the only meaningful financial deterrent to antitrust violations." Remarks of Richard W. McLaren before the Antitrust Committees of the Federal Bar Association and the Philadelphia Bar Association, December 11, 1969.

The Federal Trade Commission has also stated that its policy in enforcement shall be directed toward assisting private litigants. *H. P. Hood & Sons, Inc.*, Docket No. 7709; 58 F.T.C. 1184 (1961) at 1189-1190.

The decree as approved by the District Court frustrates the Congressional policy of joint governmental-private effort in enforcement of the antitrust laws.

While Section 5(a) of the Clayton Act does give recognition to the consent decree procedure used by the United States in disposing of antitrust cases, this statutory recognition cannot be read as obliterating the overall Congressional policy for protection of free competition upon agreement of the parties to an action.

The public funds, manpower and facilities which were employed by the Department of Justice in its investigation of this sixteen year conspiracy, and which could be employed in the prosecution of this action, far exceed the resources available to any private plaintiff. The magnitude of the alleged violations demand that such resources be used to effectuate compliance with the antitrust laws. The delays necessarily created by the several-fold duplication of the government effort by the many parties affected by this action would be avoided by the prosecution of the United States' action.

The Department of Justice has previously recognized the need to cooperate with private litigants in pursuit of its obligation to further Congressional policy. The Department has accomplished this objective by including within certain consent decrees specific provisions (commonly known as an "asphalt clause") admitting the allegations of the complaint for the benefit of subsequent private litigants. The consent decrees in *United States v. Lake Asphalt and Petroleum Co. of Massachusetts*, 1960 C.C.H. Trade Cases, Para. 69,835 (D. Mass. 1960); and *United States v. Allied Chemical Corp.*, 1961 C.C.H. Trade Cases, Para. 69,923 (D. Mass. 1961) contained such provisions for the purpose of private actions by states and local governments which followed Federal government suits.

Defendants-appellees strenuously objected to the inclusion of an "asphalt clause" in the consent decree, and threatened to litigate the case fully if such a clause was included (Defendants' Opposition to Applications for Leave to Intervene and Other Petitions and Comments Regarding the Proposed Consent Decree, and Memorandum of Points and Authorities, p. 23).

That settlement may offer an expedient resolution of many or most antitrust cases does not mean that settlement in a particular case, *this case*, will produce the most satisfactory result. This case is unique in the extent of its impact upon the public interest. It can be fairly said that every individual in this country who breathes will be affected by the outcome of this action. The general importance of a dual governmental-private effort in combating antitrust violations as severe as those alleged in the government complaint make it clear that in this case the only viable alternative to a complete litigation of the issues is a consent decree containing a limited admission by the defendants of the allegations in the complaint. This admission would be solely for the purpose and to the extent necessary to give *prima facie* effect to the decree in subsequent private treble damage actions. The defendants-appellees readily recognize the onerous effects of the consent judgment obtained. Docket No. 31 of the Judicial Panel on Multidistrict Litigation of the United States District Courts is "In re: Multidistrict Private Civil Treble Damage Anti-trust Litigation Involving Motor Vehicle Air Pollution Control Equipment". In the January 1970 "Memorandum of Defendants in Response to Panel Order to Show Cause and Notice of Hearing", the defendants-

appellees make the following statement and observation:

> "If, after limited discovery, these motions [pre-trial motions] are not successful, it would appear that exhaustive full-scale discovery is likely to occur involving the examination of numerous witnesses and voluminous documents. This is especially so because, unlike some antitrust cases which have been the subject of consolidated pre-trial proceedings in the past, there has been no adjudication of liability here and, in addition, the right to assert a claim for damages is far from clear. In many of these other treble damages cases, the private plaintiffs have available to them a prior adjudication of antitrust violations which had *prima facie* effect, and, accordingly, the basic issue in those cases was not whether, but how much, the plaintiffs had been injured." (Pages 1 and 2).

The District Court Abused Its Discretion by Denying Consolidation of the Two Actions.

Rule 42(a) of the Federal Rules of Civil Procedure provides:

> "CONSOLIDATION. When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs of delay."

Consolidation may be ordered before issues are joined where common questions are involved. *Schultz v. Man-*

ufacturers and Traders Trust Co., 29 F. Supp. 37 (W.D.N.Y. 1939). To expedite the trial and eliminate unnecessary repetition and confusion trial judges have been urged to make use of Rule 42(a). *DuPont v. Southern Pacific Company*, 366 F. 2d 193 (5th Cir. 1966).

Each of the two cases pending before the District Court involves like questions of law and fact and the same defendants.

> "The consolidation of an action brought *by* the United States with another action in which either the United States or a private person is plaintiff should be governed by the general principles of Rule 42, since the Federal rules are generally applicable to the United States and these actions do not involve any problem of sovereign immunity from suit." 5 Moore's Federal Practice, Para. 42.02, p. 42-19 (2nd Ed. 1968).

See also *Gerber Products Co. v. Beech-Nut Lifesavers, Inc.*, 25 F.R. Serv. 42a.1, Case 1 (consolidation of two antitrust cases against the common defendant, despite one unrelated issue in each case); *Atlanta Hydratane Gas, Inc. v. Lowery Tims Co.*, 41 F.R.D. 164 (N. D. Miss. 1966), (four actions by different plaintiffs consolidated where all plaintiffs sought relief against common defendant for alleged discrimination in pricing practices in violation of the Robinson-Patman Act). The delay, duplicity of expense, and time and inconvenience to witnesses created by maintaining these suits as separate actions could have been avoided by consolidating these essentially identical cases.

Conclusion.

The issues involved in this appeal are substantial. The resolution thereof will have a significant impact on the public interest. Plenary consideration by this Court is required. Historians may hopefully read William Shakespeare's observation as an anachronism:

> ". . . this most excellent canopy, the air, look you, this brave o'erhanging firmament, this majestical roof fretted with golden fire,—why, it appears no other thing to me than a foul and pestilent congregation of vapours."
>
> William Shakespeare, *Hamlet*,
> Act II, Scene II.

Respectfully submitted,

SCHWARTZ & ALSCHULER,
By BENJAMIN F. SCHWARTZ,
and
HERBERT A. KARZEN,
Counsel for Appellants,

APPENDIX A.

Judgment of the District Court.

[¶72,907] United States v. Automobile Mfrs. Assn., Inc., General Motors Corp., Ford Motor Co., Chrysler Corp., and American Motors Corp.

In the United States District Court for the Central District of California. Civil Action No. 69-75-JWC. Entered October 29, 1969.

Case No. 2037 in the Antitrust Division of the Department of Justice.

Sherman Act.

Conspiracy — Automobile Manufacturers — Development of Smog Control Devices—Joint Activities.—Four automobile manufacturers and their trade association were prohibited from conspiring to delay and obstruct the development and installation of pollution control devices for motor vehicles. The decree prohibitions include: (1) restraining in any way the individual decisions of each auto company as to the date when it will install emission control devices; (2) agreeing not to file individual statements with governmental agencies concerned with auto emission and safety standards and from filing joint statements on such standards unless the governmental agency involved expressly authorizes them to do so; (3) continuing a 1955 cross-licensing agreement and refusing to grant royalty-free licenses on auto emission control devices under patents subject to the 1955 agreement to all who may request them; (4) agreeing to exchange their companies' confidential information relating to emission control devices or to exchange patent rights covering future inventions in this area; and (5) continuing their joint assessment of pat-

ents on auto emission control devices offered to any of them by outside parties as well as their practice of requiring outside parties to license all of them on equal terms.

See Combination and Conspiracy, Vol. 1, ¶ 1680; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8834.10

For the plaintiff: Richard W. McLaren, Asst. Atty. Gen., Baddia J. Rashid, Lewis Bernstein, William D. Kilgore, Jr., Raymond W. Philipps, Bernard M. Hollander, Allen E. McAllester, Charles F. B. McAleer, and C. Brooke Arnold, Attys., Dept. of Justice.

For the defendants: Gibson, Dunn & Crutcher, Julian O. Von Kalinowski, Paul G. Bower, Wilmer, Cutler & Pickering, Lloyd N. Cutler, and Howard P. Willens, for Automobile Mfrs. Assn., Inc.; Ross L. Malone, Lawler, Felix & Hall, Magens Mattson, and Robert Hemgson, for General Motors Corp.; Overton, Lyman & Prince, Earl J. Schuck, Wayne H. Knight, for Ford Motor Co.; McCutchen, Black, Verleger & Shea, Philip K. Verleger, and William G. Shea, for Chrysler Corp.; O'Melveny & Myers, Allyn D. Kreps, and Girard E. Boudreau, Jr., for American Motors Corp.

Final Judgment

CURTIS, D. J.: The plaintiff, United States of America, having filed its complaint herein on January 10, 1969, and the plaintiff and the defendants, by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of or finding on any issues of fact or law herein and without this Final Judgment constituting evidence or an admission by any of them in respect to any such

Now, Therefore, before any testimony has been taken and without trial or adjudication of or finding on any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 4 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Devices" means air pollution emission control designs, devices, equipment, methods, or parts thereof, for motor vehicles.

(B) "Restricted information" means all unpublished information of the type customarily classified as company confidential concerning applied as distinguished from basic research in or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving or lowering the cost of Devices by motor vehicle manufacturers. "Restricted information" shall not mean (1) information concerning basic research in gaining a fuller knowledge or understanding of the fundamentals of phenomena and of observable facts, or (2) information which is or becomes known to the public generally other than through a violation of this Final Judgment.

understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere, or (ii) information relating primarily to equipment, methods or procedures for the testing or measurement of Devices, or (iii) information for or resulting from the testing or measurement of production prototypes of Devices of an advanced stage exchanged solely for such purposes. Information shall be deemed to be published when it is disclosed without restriction to the public, or to media of general circulation, or to the trade press, or to meetings of stockholders, dealers, or financial analysts, or to meetings of professional, scientific or engineering societies, or committees thereof, the membership of which is not limited to persons employed by defendants or by motor vehicle manufacturers, or to meetings called by representatives of Federal, state or local governments or agencies authorized to issue motor vehicle emission control regulations.

III

[*Applicability*]

The provisions of this Final Judgment shall be binding upon each defendant and upon each of its subsidiaries, officers, directors, agents, servants, employees, successors and assigns, and upon all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to any transaction between or among a parent company, its subsidiaries, officers, directors, agents, servants and or employees. Nothing in this Final Judgment shall have any effect with respect to any activities out-

side the United States which do not adversely and substantially affect the foreign commerce of the United States.

IV

[*Pollution Control Devices*]

(A) Each defendant is enjoined and restrained from:

(1) Combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of Devices;

(2) Entering into, adhering to, enforcing or claiming any rights under any provisions of any agreement, arrangement, understanding, plan or program (hereinafter "agreement") with any other defendant or manufacturer of motor vehicles or Devices:

(a) to exchange restricted information;

(b) to cross-license patents or patents rights on Devices which cross-license includes patents or patent rights acquired subsequent to the date of any such cross-license;

(c) to delay installation of Devices or otherwise restrain individual decisions as to installation dates;

(d) to restrict publicity of research and development relating to Devices;

(e) to employ joint assessment of the value of patents or patent rights of any third party relating to Devices;

(f) to require that acquisition of patent rights relating to Devices be conditioned upon availability of such rights to others upon a most-favored-purchaser basis;

(g) to file, in the absence of a written authorization for a joint statement by the agency involved, with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations except joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also file a statement individually upon written request by the agency involved; or

(h) not to file individual statements with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations.

(B) Nothing in this Final Judgment shall prohibit any defendant

(1) from furnishing or acquiring any restricted information for the defense or prosecution of any litigation or claim;

(2) from entering into or performing under any otherwise lawful agreement with any other person or

conducting *bona fide* negotiations looking to any such agreement:

(a) for the purchase or sale of specific commercial products;

(b) for the license of specific existing patent rights or from including in any such agreement provision for a nonexclusive grant back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or

(c) for the purchase, sale or license of specific existing restricted information or specific engineering services relating to Devices or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the license during the term of the license or a reasonable period thereafter; or from furnishing or acquiring any restricted information directly relating thereto;

(3) from entering into, renewing or performing under any otherwise lawful agreement with any non-defendant person, firm or corporation that does not account for more than 2% of world production of motor vehicle passenger car, truck and bus units in the calendar year preceding the entering into or renewing such agreement (See Appendix A [Not Reproduced]); or

(4) from entering into, renewing or performing under any agreement which is submitted in writing to the plaintiff and to which plaintiff consents in writing.

(C) Nothing in Section IV(A)(2)(a) shall prohibit any defendant from engaging in any activity outside the United States reasonably necessary:

(1) to the development of, response to, or compliance with existing or proposed vehicle emission laws, regulations or standards of a foreign governmental body, or

(2) to the performance under any otherwise lawful agreement for the production of motor vehicles outside the United States with any person, firm or corporation not engaged in the production of motor vehicles in the United States at the time of entering into or renewing such agreement.

V

[Withdrawal from Cross-Licensing Agreement]

(A) Each manufacturing defendant is ordered and directed to exercise its right to withdraw from the AMA cross-licensing agreement of July 1, 1955, as amended, and to take such steps as are necessary to accomplish said withdrawal within one hundred twenty (120) days from the date of entry of this Final Judgment. Notwithstanding such withdrawal defendants may continue to exercise those rights and claims relating to royalty-free licenses under the cross-licensing agreement which have accrued up to the date of entry of this Final Judgment.

(B) Defendant AMA is ordered and directed to relinquish its responsibilities under the AMA cross-licensing agreement of July 1, 1955, as amended, within sixty (60) days from the date of entry of this Final Judgment.

VI.

[Co-operation with Licensees]

(A) Upon written request therefor and subject to the conditions set forth herein:

(1) Each manufacturing defendant is ordered and directed to grant to any person to the extent that it has the power to do so a nonexclusive, non-transferable and royalty-free license to make, have made, use, lease or sell Devices under any claim of any United States patent or any United States patent application owned or controlled by said defendant or under which it has sublicensing rights, which patent was issued or application was filed prior to the date of entry of this Final Judgment and licensed under the AMA cross-licensing agreement of July 1, 1955, as amended, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license under this paragraph may provide for the payment of those same royalties to the defendant;

(2) Each manufacturing defendant shall grant to any licensee under (1) above, to the extent that it has the power to do so, an immunity from suit under any foreign counterpart patent or patent application for any product manufactured in the United States under the license for sale abroad or for any product manufactured abroad and sold in the United States, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license

may provide for the payment of those same royalties to the defendant; and

(3) Defendant AMA is ordered and directed to make available for examination and copying by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment, which are identified in Appendix B [not reproduced];

(B) Any existing licensee of any manufacturing defendant shall have the right to apply for and receive a license or licenses under this Final Judgment in substitution for its existing license or licenses from any manufacturing defendant, insofar as future obligations, and licenses are concerned. Any licensee shall be free to contest the validity and scope of any licensed patent.

VII

[*Notification*]

Defendant AMA is ordered and directed to mail a copy of this Final Judgment to all signatories to the AMA cross-licensing agreement of July 1, 1955, as amended, and to all known domestic manufacturers of motor vehicles and motor vehicle engines within thirty (30) days from the date of entry of this Final Judgment, and to issue a press release to the domestic trade and business press relating the substance of the Final Judgment.

VIII

[Inspection and Compliance]

For the purpose of determining or securing compliance with this Final Judgment, duly-authorized representatives of the Department of Justice shall, upon written request of the Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principle office, be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. Said defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[Expiration]

Section IV(A)(2)(a) and (g) of this Final Judgment shall expire ten years after the date of entry hereof, provided that plaintiff may apply to this Court for the continuation of one or both of said provisions, such application to be made not later than nine years after the date of entry of this Final Judgment.

X

[Jurisdiction Retained]

Jurisdiction if this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for sich further orders and directions as may be necessary or appropriate in relating to the construction of or carrying-out of this Final Judgment, for the modification or vacating of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

APPENDIX B.

Memorandum Opinion.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. Automobile Manufacturers Association, Inc.; General Motors Corporation; Ford Motor Company; Chrysler Corporation; and American Motors Corporation, Defendants. 69-75-JWC.

This is an action brought by the United States of America charging that the defendants, Automobile Manufacturers Association, Inc.; General Motors Corporation; Ford Motor Company; Chrysler Corporation; and American Motors Corporation have conspired with other motor vehicle manufacturers, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment. By way of relief, the plaintiff is seeking an order enjoining these defendants from continuing the alleged unlawful conduct.

After eight months of negotiation, the parties have agreed to settle this case upon terms and conditions embodied in the proposed consent decree now before this court for approval.

On September 11, 1969, the proposed decree was made public and all interested parties, including the State of California, County of Los Angeles, City of Los Angeles and the Air Pollution Control District of the County of Los Angeles, were invited to express

SUPREME COURT, U. S.
ORIGINAL
FEB 24 1970
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

October Term, 1969

FEB 24 1970

No. 1121

OFFICE OF THE CLERK
SUPREME COURT, U.S.

CITY OF NEW YORK,

Appellant,

vs.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION,

Appellees.

On Appeal from the United States District Court for the Central District of California.

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES (CALIFORNIA) AND THE AIR POLLUTION CONTROL DISTRICT OF THE COUNTY OF LOS ANGELES, IN SUPPORT OF APPELLANT CITY OF NEW YORK.

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JOHN H. LARSON,
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DAVID D. MIX,
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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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In the
Supreme Court of the United States

October Term, 1969

No.....

CITY OF NEW YORK,
Appellant,

vs.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION,
Appellees.

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES (CALIFORNIA) AND THE AIR POLLUTION CONTROL DISTRICT OF THE COUNTY OF LOS ANGELES, IN SUPPORT OF APPELLANT CITY OF NEW YORK.

STATEMENT OF THE CASE

As early as 1953, defendants-appellees (other than the United States of America) and a number of alleged co-conspirators were engaged in a combination and conspiracy in unreasonable restraint of the interstate trade and commerce[1] in motor vehicle air pollu-

[1]Such trade and commerce is described in Section V of the Complaint filed by the United States against defendants-appellees on January 10, 1969. See Appendix B, infra, pp. 20a-21a.

tion control equipment. The combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants-appellees and co-conspirators, the details of which are set out in Appendix B.[2]

A Federal Grand Jury was impaneled in 1966 to investigate the practices of the automotive industry regarding the aforesaid anti-competitive practices. As a result of the evidence assembled by the Grand Jury over an eighteen month period, the United States, on January 10, 1969, filed a civil complaint charging appellees and a number of alleged co-conspirators with violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint essentially charged that an agreement to eliminate all competition in the development of air pollution control equipment had been entered into by and between defendants-appellees and their alleged co-conspirators, and that they had agreed and conspired "to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment."[3]

Defendants-appellees were neither required to nor did they answer the complaint. Rather, a proposed final judgment and stipulation that judgment could be

[2]See Sections VI and VII of the Complaint, Appendix B, infra, pp. 21a-23a, which sections set forth the offenses alleged and the effects attributable to the aforesaid combination and conspiracy.

[3]See Complaint, Section VI, 14(c) (1)-(3), Appendix B, infra, pp. 22a-23a.

entered was filed in the District Court on September 11, 1969.[4] Subsequently, the District Court entered an order setting the matter for hearing on October 28, 1969. At the conclusion of oral argument on the above-mentioned date, the Court denied all applications for intervention and approved the consent decree as submitted by the parties.[5] Judgment was entered on October 29, 1969.

On December 17, 1969, the District Court denied a second application by appellant City of New York for leave to intervene. Thereafter, on December 22, 1969, appellant City filed a notice of appeal in the United States District Court for the Central District of California, alleging appellate jurisdiction in this Court by virtue of 15 U.S.C. § 29.[6] That appeal led to the filing of appellant's Jurisdictional Statement, in support of which this brief *Amicus Curiae* is submitted.

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[4]The Stipulation provided that the United States might withdraw its consent before the expiration of 30 days; thereafter judgment could be entered.

[5]The District Court also denied a motion to consolidate a separate action, filed by Marshall B. Grossman and S. Jerome Tamkin on September 17, 1969, with the action instituted by the United States. Messrs. Grossman and Tamkin have since initiated a separate appeal to this Court, a Jurisdictional Statement on their behalf having been filed sometime prior to the submission of this brief *Amicus Curiae*.

[6]See also *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 131 (1967); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

INTEREST OF AMICUS CURIAE

This brief *Amicus Curiae* is submitted on behalf of the County of Los Angeles (California) and the Air Pollution Control District of the County of Los Angeles, and in support of the Jurisdictional Statement filed with this Court on January 26, 1970, by appellant City of New York.[7] The *amici* here have substantially the same interest as appellant.[8]

There is hardly need to mention the continuing problem air pollution poses for major urban areas such as New York City and the Los Angeles Basin. The urgency of the situation, especially in Los Angeles County, where both the human and the automobile population are increasing rapidly, has never been more obvious. A solution to the control of automobile emissions must be forthcoming early in the new decade.

The County of Los Angeles and the Air Pollution Control District have been actively engaged in the control of air pollution for over two decades. The Air Pollution Control Law of 1947 (CAL. HEALTH & SAFETY CODE), adopted by the California Legislature

[7]Since *amicus* here is a political subdivision of the State of California, letters of consent to filing of this brief, or a motion for leave to file, are unnecessary. U.S. Sup. Ct. Rule 42(4), 28 U.S.C. It is further hoped that the Court will give full consideration to this brief, despite late filing. No notice of this appeal was received until nine days after appellant filed its Jurisdictional Statement. The period since then has been occupied with the writing and printing of this brief. Pursuant to the advice of the office of the Clerk of this Court, typed copies of this brief were served upon all parties prior to the filing of printed copies with the Clerk.

[8]A motion for leave to intervene, submitted by *amici* to the District Court reciting substantially the same grounds as the motion submitted by appellant was denied below.

is recognized and used throughout the nation as a model for effective air pollution control regulations.

The Air Pollution Control District has expended approximately $60,000,000 of public funds since its creation under the Act. Its program, its rules and regulations, and its effectiveness are recognized throughout the nation and the world. No agency, including the State of California and the Federal Government, can claim even to approach the record of the District in the field of air pollution control.

Los Angeles County, with its low wind velocities and frequent temperature inversions, is especially susceptible to air pollution. Emissions of air contaminants from stationery sources are strictly controlled by law; but each day motor vehicles discharge 12,000 tons of hydrocarbons, carbon monoxide, oxides of nitrogen, and other contaminants into the air of the Los Angeles Basin.

The fact that emissions from motor vehicles pollute the air has been known for many years. In the early 1950's the automobile was clearly identified by scientists as the primary cause of the typical Los Angeles photochemical "smog."

These matters were known to the automobile manufacturers, and County officials regularly informed them and communicated with them. The manufacturers neither recognized that they had any responsibility for developing air pollution control devices nor did they make any substantial effort to develop them.

In 1953, the manufacturers entered into the agreements which constituted the alleged combination in restraint of trade. In 1955 the cross-licensing and "most favored purchaser" agreements were made. No devices were produced.

In 1960, the California Legislature, convinced that no progress would be made voluntarily by the manufacturers, adopted statutes which in effect required air pollution control devices on new automobiles. (Stats. 1st Ex. Sess. 1960, Ch. 23). The manufacturers were successful, however, in delaying the "positive crankcase ventilation system" device until 1963 and the exhause control device until the 1966 model.

In recent years, the manufacturers attempted to pull the teeth of the California Legislature by having the United States Congress occupy the field. In this effort they were partially successful. (See: 42 U.S.C. Sec. 1857f-6a)

In the meantime, it became well-established knowledge that air pollution from motor vehicles seriously damaged crops, forest trees, and other property. There was firm evidence in the 1950's that it also aggravated respiratory diseases, such as emphysema. Many thousands of people have been ordered by their physicians to leave Los Angeles because of the effect of air pollution upon their health. There is little doubt that breathing polluted air causes or contributes to the causation of a variety of respiratory diseases.

From its experience, the Air Pollution Control District is convinced that the automobile manufacturers will do only those things in the field of air pollution which they are required by law to do, and that if permitted to do so, they will collectively resist any such regulation.

In the light of the facts alleged by the United States in its complaint,[9] it appears clear that the conspiracy has already accomplished its purpose. No reasonable man would conclude that any such agreement could forever protect the industry. Its sole purpose must have been to accomplish one thing—delay. Obviously, it has succeeded. The monetary gain to the industry from the delay must be estimated in billions of dollars. The resulting irreparable damage to the public cannot even be estimated. The County and the public are justly concerned about the fact that the automobile industry appears to have committed a serious and calculated act of fraud in violation of federal law, and to have escaped any penalty for having done so. The judgment entered below does no injury to the defendants. It merely protects them from a public trial which would reveal the details of the conspiracy alleged, not only to the public and a concerned Congress, but also to those private individuals and public agencies which have just and lawful claims against the alleged conspirators. Indeed, the challenged consent judgment may be worth as much in dollars to the industry as the original delay.

[9]See Appendix B pp. 21a-23a

It will be our purpose, in this brief, to show, first, that the consent judgment entered below frustrates the ability of private litigants to obtain the information which the United States Attorney General and the Federal Grand Jury were able to obtain; second, that the decree fails to provide safeguards necessary to promote the Congressional purpose of assisting individual litigants; and third, that the particular consent judgment in this case is not in the public interest.

ARGUMENT

I. INTRODUCTION.

The entry of a consent decree in antitrust cases is a judicial function, the force of which is not to adjudicate the merits of the contested issues posed by the Government's complaint, but rather to decide whether or not the court should exercise its equity powers in such a fashion as to make the provision of the proposed "settlement" between the Government and the defendants a decree of the court.[10] It appears to be the general view that the public interest is most often served by judicial approval of such decrees.[11] Nevertheless, "it is the court's duty to protect the rights of persons who are not parties to the action and, of course, the decree should not be approved if it is contrary to the public interest."[12] Consequently, where "countervailing con-

[10] *United States v. Carter Products Co., Inc.*, 211 F. Supp. 144, 148 (S.D. N.Y., 1962).

[11] Id.

[12] See Appendix A. Opinions of the District Court, Oral Opinion, at p. 3a.

siderations of a substantial nature are present, a court would be justified in refusing to enter such a decree.[13] There are several factors which suggest that in this case the consent judgment should not have been approved.

Consent decrees have been a traditional mechanism for the settlement of antitrust controversies without the burden of protracted litigation. As such they have justly received validation by this Court.[14] The theory behind such judgments has been that the decree itself, if properly drafted, will meet the anti-competitive practices alleged in the complaint and thus protect the public interest via the maintenance of unrestricted market forces. The approval by the District Court of the consent decree here in question was evidently grounded on this rationale.[15]

The public interest, however, is not protected by a consent decree entered in a case where such interest is obviously more than economic.[16] Increased air pollution leads to increased "social costs", such as respiratory disease and crop damage,[17] the implications of which should be considered "countervailing consider-

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[13]211 F. Supp. 144, 148, *supra*.

[14]*Swift & Co. v. United States*, 276 U.S. 311 (1928).

[15]See Appendix A, infra, Oral Opion, at p. 5a. Memorandum Opinion, pp. 13a-14a.

[16]Most activity in our society, of course, can be said to have economic implications. Reference here is made to the more precise concept of market economics with which antitrust legislation has traditionally dealt.

[17]A more detailed discussion of the effects of air pollution appears in the section of this brief entitled "Interest of Amicus Curiae", beginning at p. 5

ations of a substantial nature." Furthermore, it is not clear in a case such as this that the Federal Government is the only arbiter of the public interest. California, for example, has established far-reaching statutory authority to allow local agencies to deal with air pollution.[18] In fact, it would appear that the public interest could not possibly be served where the United States vigorously opposes the intervention of other responsible public bodies,[19] especially where the social effects of the decree which it authored are so obvious.

II. THE CONSENT JUDGMENT FRUSTRATES ACCESS TO THE FACTS OF THE ALLEGED CONSPIRACY.

It was strongly contended below that any person with an action pending will be able to secure the same information which the United States Attorney General and the Federal Grand Jury were able to obtain, through discovery proceedings. This argument is without merit.

The federal investigation of this matter continued over a period of approximately two years, with the Grand Jury in session over 18 months. The acts of the alleged conspiracy investigated took place over a per-

[18] See CALIFORNIA HEALTH & SAFETY CODE, Sections 24198-24341.

[19] The United States filed a 28 page brief with the District Court on October 17, 1969, responding to and opposing the various applications to intervene, including detailed comments in support of the then proposed consent decree. Intervenors included, among others, the City of New York and the *amici*.

iod of at least 12 years (1953-1965), and perhaps over a longer period.

All of the powers of the Department of Justice and of the Grand Jury were available to the investigators, and we understand that they were used. How many witnesses were called we do not know, but judging from the time expended there must have been a great many. We do know that the documents examined numbered at least several hundred. Those which the Attorney General thought important enough to name required 22 pages of legal-sized paper just to list.

The facts of an antitrust case are difficult enough for the non-federal attorney to obtain. Here, where the alleged conspiracy is in essence an agreement not to develop a product, and to avoid regulation, the relevent facts will be difficult to identify, not to mention difficult to find. The cost of attempting to duplicate the federal investigation would be astronomical in time and money.

Furthermore, the decree contains neither a limited admission of guilt[20] nor is there any provision for releasing the documents to private litigants. If nothing else, the omissions in the decree demonstrate that the United States did not adequately represent the appellant or the *amici* herein.

[20]Reference here is made to the use of an "asphalt clause," urged below by appellant and *amici*. See *United States v. Lake Asphalt & Petroleum Co. of Mass.*, 1960 Trade Cas., par. 69,835 (D. Mass. 1961); *United States v. Allied Chemical Corp.*, 1961 Trade Cas., par. 69,923 (D. Mass. 1960); *United States v. Bituminous Concrete Assoc.*, 1961 Trade Cas., par. 69,878 (D. Mass. 1960); *The Government and the Private Antitrust Suit*, Dept. of Justice Release, December 11, 1969, p. 13.

In summary, there is no merit to the contention that the consent decree does not hamper, if not preclude, discovery of the facts of the alleged conspiracy. No one can assert that there is more than a possibility that the relevant facts would be revealed. This is not enough.

III. THE DECREE FAILS TO PROVIDE SAFEGUARDS NECESSARY TO PROMOTE THE CONGRESSIONAL PURPOSE OF ASSISTING INDIVIDUAL LITIGANTS.

In its scheme for enforcement of the antitrust laws, Congress contemplated both federal and individual actions to achieve the broad social object of the statute. *New Jersey Woodfinishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F.2d 346, 350-351 (3rd Cir., 1964), aff'd. 381 U.S. 311 (1965); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir., 1955); see also, MacIntyre, "*The Role of the Private Litigant in Antitrust Enforcement*," 7 Antitrust Bull. 113 (1962).[21]

This scheme of public and private enforcement was contained in the original enactment of the Sherman Act in 1890 and has since been strengthened by the passage of the Clayton Act in 1914 and in subsequent amendments in 1955.

[21] A. Everett MacIntyre, Commissioner, Federal Trade Commission.

The enactment of private treble damage provisions in the Act made the public an ally of the federal government and the private suit a substantial weapon of national antitrust policy. Professor Phillip Areeda, of the Harvard Law School and a specialist in Antitrust law, remarked as follows:

> "Such a remedy not only compensates private persons for their injuries, but gives them a powerful financial incentive to enforce the antitrust laws. The result is that public enforcement, which is inevitably selective and least likely to concern itself with local, episodic, or less than flagrant violations, is supplemented by private enforcement, which increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct. Some antitrust violators have found the cost of violation to be very high, even though treble damage payments are a deductible business expense for Federal income tax purposes . . . ."[22]

Other authorities in the antitrust field concur. Professors Carl Kaysen and Donald F. Turner further note:

> ". . . Private suits are becoming more of an important supplementary enforcement device. They may be the most effective way of policing the multitude of comparatively local and insignificant violations that will tend to escape the glance of

[22] P. Areeda, *Antitrust Analysis* (1967), Little, Brown and Company, Boston, 1967, at pp. 35-36.

> federal enforcement authorities or that, even if noticed, do not merit the expenditure of limited enforcement resources. Moreover, the prospect of private damage suits is a growing deterrent to illegal conduct, although the difficulties of proving damages remain very great in most situations."[23]

The enactment of Section 5 of the Clayton Act and its later amendment (15 U.S.C. par. 16a and b) have been interpreted by the Supreme Court as an expression of Congressional intent to ". . . use private self-interest as a means of enforcement of the antitrust laws." *Bruces Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947), and that private parties were to be given the benefits of prior government suits. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311, 317-318 1965); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 567-568 (1951); *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 784-785 (3rd Cir., 1967), affirmed in part, reversed in part, 392 U.S. 481 (1968); *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F. Supp. 540, 542 (E.D.Pa., 1967); *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, 834 (E.D.Mich., 1963). The historic intent of Congress to utilize private suits as a method of achieving effective antitrust compliance was well-expressed by President Woodrow Wilson in

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[23]C. Kaysen and D. F. Turner, *Antitrust and Legal Analysis*, Harvard University Press, Cambridge, 1965, at p. 257.

1914 when he urged the Congress to facilitate the interaction of private and government actions by:

> ". . . giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit. . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience."[24]

In 1955, Congressman Wright Patman echoed President Wilson's statement when he stated to the House Antitrust Subcommittee:

> ". . . You and I have recognized that we need a strong and effective antitrust policy to preserve competition. We have recognized that a necessary and integral part of any such policy is full and effective enforcement of our antimonopoly laws. For many years it has been recognized that the Government alone is not able to provide all of the necessary enforcement. The help of all citizens is

[24] Woodrow Wilson, "Special Address Delivered at a Joint Session of Congress," January 20, 1914, Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, p. 7918, as quoted in MacIntyre, *"The Role of the Private Litigant in Antitrust Enforcement,"* 7 Antitrust Bull. 113, 119-120 (1962).

needed. We know that private parties will help in this endeavor if we afford them rightful opportunities. In other words, we can expect this help if we give them the right to proceed, and see to it that they are treated reasonably respecting recoveries of damages and costs of litigation."[25]

The Senate Committee report on proposed amendments to Section 5 of the Clayton Act states:

"At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble-damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act. . . .

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful government action, so that the judgments and decrees in the federal proceedings could be used to establish a case. *Amassing evidence for antitrust cases would otherwise be a prohibitively*

[25]Statement of Rep. Wright Patman before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 10243, August 6, 1958, Id. at 115-119.

expensive task for most plaintiffs. (S. Rep. No. 619, 84th Cong., 1st Sess., June 21, 1955; U.S. Code Cong. & Ad. News. 2329 (1955)) (Emphasis added).

The Supreme Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, (1951) examined the history of the policy that assistance to private litigants from government action was to be encouraged as a significant factor in compelling obedience to the antitrust laws. The Court stated:

> "Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress 'agree in giving private individuals . . . the right to found their [antitrust] suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has . . . sued the combinations complained of and won its suit. . . .' 51 Cong. Rec. 1964. Congressional reports and debates on the proposal which ultimately became par. 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions. . . ."

In *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, (E.D. Mich. 1963), the Court discussed the policy of the antitrust laws with respect to private treble damage actions:

> "The purpose of Section 4 of the Clayton Act, Title 15, U.S.C., par. 15, which provides for pri-

vate triple damage suits is 'to enlist "the business public . . . as allies of the government in enforcing the antitrust laws;" the means chosen, on the other hand is to give the "injured party ample recompense for the wrong suffered" allowing three-fold recovery of damages.' Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 378 (1955). 'In other words,' the private antitrust suit is a substantial weapon in effectuating a national policy of protecting, preserving and promoting free competition in the marketplace by blending 'antitrust policy with private compensatory law.'" (215 F. Supp. at 834)

The actions of appellant and *amici*, via their applications to intervene in the District Court, represented the blend of public and private enforcement activities contemplated by Congress.

This consent decree frustrates the Congressional purpose by substantially eliminating the possibility of private suits. Rather than assisting private plaintiffs, the decree requires them to duplicate the extensive government investigation and affords the defendants appellees an opportunity to escape without admission of guilt.

The public funds, manpower, and facilities employed by the Department of Justice in its investigation of this matter far exceed the resources available to any other plaintiff. The consent decree, however, renders useless the results of the Antitrust Division efforts

and expenditures. The decree completely denies to the public, which has been injured by defendants' violation of the antitrust laws, any benefit from the government investigation. Not only does the decree specify that it is neither evidence nor an admission of guilt; it omits any provision for the release of information or evidence to private litigants.

The omission of any assistance to or protection of individual litigants suing in the public interest runs contrary to the frequently stated policy of the antitrust laws. The County and District's main objection here is that the public interest in treble damage antitrust enforcement, as expressed by the Congress, a President of the United States, and the Supreme Court, is not protected at all by this decree. The District Court did not merely record an agreement of the parties; it made an independent judicial determination as to the *adequacy* of the decree in protecting the public interest. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The decree should have contained provisions to secure the benefits of the government action herein for private and public litigants.

Both *amici* and appellant proposed modifications to the decree prior to its entry by the District Court. Those modifications were to have provided the assistance contemplated by Congress to private litigants so that they might have made meaningful use of the expenditure of public funds and the efforts of government officials in the investigation of this matter. For

example, the modifications would have thus enabled the County of Los Angeles and the Los Angeles County Air Pollution Control District to effectively take up the role planned for them as the other arm of antitrust enforcement. The partnership between federal and "private" plaintiffs envisaged by Congress would thus have operated as a truly substantial weapon by combining the investigative resources of the federal government with the incentive of compensation by treble damages for persons injured by the conduct of the defendants-appellees.

The primary requested modifications included the following:

> a. The inclusion of a limited admission of guilt to give the consent decree *prima facie* effect under Section 5(a) of the Clayton Act; and,
>
> b. The inclusion of terms in the decree which would have impounded the evidence gathered by the government and make it available to private litigants.

A. The Decree Should Have Included a Limited Admission of Guilt.

When the judgment was signed, there should have been included in the decree a limited admission that the defendants violated the Sherman Act as charged in the government complaint. This admission (commonly known as an "asphalt clause") would have been solely for the purpose and to the extent necessary

to give *prima facie* effect to the decree in public and private treble damage actions. The Department of Justice has previously recognized the need to cooperate with "private" litigants in pursuit of its obligation to further the public policy established by Congress. The Department has accomplished this objective by providing for such limited admissions of guilt as part of its consent decrees. The consent decrees in *United States v. Lake Asphalt and Petroleum Co. of Massachusetts*, 1960 CCH Trade Cas. par. 69, 835 (D.Mass., 1960); *United States v. Bituminous Concrete Association, Inc., et al.*, 1960 CCH Trade Cas. par. 69, 878 (D.Mass., 1960), and *United States v. Allied Chemical Corp., et al.*, 1961 CCH Trade Cas. par. 69, 923 (D.Mass. 1961) included specific provisions admitting guilt for purposes of private actions by state and local governments which followed federal government suits. The decrees in each of these cases contain approximately the following language:

> ". . . defendants having admitted the allegations contained in the government's complaint herein, solely for the purpose and to the extent necessary to give the following adjudication the *prima facie* effect stated in Section I below in the suits specified below, and for no other purpose . . .
>
> "I. That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for

the sole purpose of establishing the *prima facie* effect of this Final Judgment, in the suits specified below, and for no other purpose.

"Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it." (The decree then sets out the state private actions to which the decree applies.) (1960 CCH Trade Cas. at par. 77, 272).

The consent decree in this case permits the defendants to avoid an adjudication or admission of their guilt by agreeing simply to refrain in the future from repeating acts which have already succeeded in their purpose. The decree enables the defendants to deny to members of the public victimized by their conduct any benefit from the government action and will require each litigant to attempt to duplicate the Antitrust Division's expenditure of funds and personnel in a reinvestigation of the same matters and issues referred to in the government complaint. Moreover, a reinvestigation and the filing of new actions will adversely affect the public interest by substantially postponing the trial of this matter. In *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F.Supp. 540 (E.D.Pa., 1967) the court, in refusing to delay discovery proceedings in a private treble

damage suit which paralleled a government criminal antitrust action, stated:

> "From the specific enforcement role given the private treble damage plaintiff by Congress, it is easy to discern a Congressional interest in the expedited trials of such actions. It would be anomalous to conclude otherwise. The antitrust laws, themselves, function as the Congressional blueprint designed to keep the American economy operating within the free enterprise guidelines mapped out under these statutes. Any threat to the free enterprise footings of our national economic superstructure, constitutes, in Congress' judgment, an immediate and serious threat to our national welfare. *The strong incentive of triple recovery encourages private litigants to vigorously enforce the antitrust laws.* Against this backdrop, unwarranted stays of proceedings stymie and offset any incentive otherwise contained in the possibility of triple recovery. Delay tends to discourage prosecution of civil litigation. As time passes, memories of witnesses fade. The inherent value of a claim for damages, enhanced by potential triple recovery, diminishes." (269 F. Supp. at 542) (emphasis added).

The government investigation took many years even with the vast resources, facilities, manpower, and money at its disposal. The duplication of that effort and expense by private litigants must, of necessity, create a serious delay in the trial of *amici's* cause. The plain fact is that nobody else has the facilities, manpower, and money to duplicate the effort.

B. Appellant, Amici, and Other Private Litigants Are Entitled to Preserve the Availability of Evidence Gathered in the Government Action.

During the course of the government's investigation, documents were submitted to the Antitrust Division by the defendants, co-conspirators, and other persons. These documents were submitted both voluntarily and pursuant to subpoena. In addition, testimony was taken of a number of witnesses before the grand jury. We therefore seek this Court's protection of all the evidence gathered by the government in its investigation. There is, we believe, a serious danger that the documents collected by the government, if returned to the persons who submitted them, will be dispersed or destroyed. The identity and contents of such documents will thereby become physically unavailable to all litigants in the prosecution of their private treble damage actions. This could well be fatal to any private litigation, and would thus totally frustrate the national antitrust policy previously discussed. The courts and the Antitrust Division itself have recognized the existence of this problem and have sought to provide the private litigant with access to, or at the very least protection of, the evidence gathered by the government. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311, 319 (1965); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264-266 (9th Cir., 1964), cert. denied, 379 U.S. 960

(1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 729, 734-736 (N.D. Ill., 1962); *United States v. Harper & Row Publishers, Inc. and Related Cases*, 67 C 612 through 67 C 629 (N.D. Ill., Nov. 20, 1967, unpublished); *H. P. Hood & Sons, Inc.*, Docket No. 7709, 58 F.T.C. 1184, 1189-1190 (1961); *Antitrust Handbook*, Federal-State Conference on Antitrust Problems, U.S. Dept. of Justice (1969), p. 65.

This Court, in *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311 (1965), discussed the benefits to private litigants from prior government actions contemplated by Congress in Section 5 of the Clayton Act. Among these benefits, according to this Court, was access to the documentary evidence marshalled by the government. The Court stated:

> "The government's initial action may aid the private litigant in a number of other ways. Pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR par. 1.132(c) (1960) See generally 16 CFR par. 1.131 et seq. (1960) . . . The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties. See Bicks, "*The Department of Justice and Private Damage*

Actions," 4 Antitrust Bull. 5 (1959); Loevinger, "*Handling a Plaintiff's Antitrust Damage Suit*," 4 Antitrust Bull. 29 (1959)." (381 U.S. at 319).

In *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), cert. denied, 379 U.S. 900 (1964) the Court of Appeals for the Ninth Circuit held that the exemption of consent decrees from the operation of Section 5(a) of the Clayton Act did not give defendants a right to non-disclosure for an indefinite perior of time or the right to withhold information which would otherwise be available to other litigants who might have need of it. The Court also stated:

> "It is immaterial that Olympic could possibly obtain the same information through the process of propounding its own interrogatories to Standard and General. *It is entitled to know what those companies* and the alleged co-conspirators *told the Government*, and this requires examination of the documents which were exchanged, or exchanged and filed in that action." (332 F.2d at 266) (emphasis added).

In the so-called Electrical Equipment cases (*Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 211 F. Supp. 729 (N.D. Ill., 1962), one of the significant pre-trial developments was the entry of an order requiring each defendant in the private litigation which followed the government criminal action to place in a central depository copies and lists of various corporate documents that had been submitted to Philadelphia grand juries investigating the industry.

The Federal Trade Commission in *H. P. Hood & Sons, Inc.*, Docket No. 7709, 58 F.T.C. 1184 (1961) refused the respondent's request that its documents be placed under seal to avoid exposure to possible treble damage plaintiffs. The Commission stated:

> "Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for secreting this evidence. Placing documents '*in camera*' for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. In enacting Section 4 of the Clayton Act (15 U.S.C. 15), which provides in part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages . . . .'; Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. This Congressional purpose has been recognized by the Supreme Court in *Lawler v. National Screen Service*, wherein the Court, holding that the circumstances of that case did not bar the action as *res judicata*, stated:
>
> > 'Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private damage action.'
>
> "Thus, in our view, the secretion of evidence for the purpose of frustrating possible treble damage plaintiffs would be opposed to the public interest and the clearly expressed will of Congress. Our ef-

> forts should be directed to aiding, not hindering, private enforcement of the antitrust laws." (58 F.T.C. at 1189-1190)

The Antitrust Division itself has recognized the need for preserving the availability of documents for use by plaintiffs in private actions which follow government suits. Thus, in *United States v. Harper & Row Publishers, Inc. and Related Cases*, No. 67 C 612 through 67 C 629 (N.D. Ill., Nov. 20, 1967, unpublished) the District Court entered an order without objection from the Antitrust Division finding:

> "... that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions."

The Court then ordered the documents retained in the custody of John E. Sarbaugh, Chief of the Mid west Office of the Antitrust Division, pending further order of the Court.

The Antitrust Handbook, compiled by the Antitrust Division for the Federal-State Conference on Antitrust Problems (1969) indicates that the Division subscribes to the concept of preserving evidence gained in its cases. The manual quotes from the statement of this Court in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, *supra*, concerning the availability of documents and other evidence. The *Handbook* then states:

"The above statement [from *Minnesota Mining and Manufacturing*] referred to Federal Trade Commission actions, but the same can be said about Department of Justice actions. The plaintiff does not necessarily obtain the relevant documents as a result of the federal action, but he learns of their existence and identity and knows what to seek when he resorts to discovery procedures. Discovery may be simplified by seeking and impounding order, under which documents discovered by the Federal Government are not directly returned to the defendants from whom they were discovered. This prevents their dispersal or destruction, and those which the damage plaintiff is entitled to discover may be obtained from a central depository." *Antitrust Handbook*, p. 95.

The *Handbook* also notes that the impounding order and central depository procedure was followed in the *Harper & Row Publishers* case cited above.

In the instant matter, an order of this Court not impounding the government's evidence and making it available to appellant and others and to other private litigants is necessary to protect the interests of private litigants.

IV. THE CONSENT DECREE ENTERED BELOW IS NOT IN THE PUBLIC INTEREST

A. Introduction.

On page 6 et seq. of their Memorandum, the defendants-appellees argue that the "competitive benefits" of the industry have reduced emissions of hydrocarbons and carbon monoxide from new cars. Nothing is said about oxides of nitrogen, which is understood not to be disputed that no emission control device [illegible] adopted mandatory [illegible]

Nowhere do defendants-appellees show how the competitive benefits [illegible] anything like [illegible] ultimate city benefits [illegible] pollutant and [illegible] would have [illegible] pleased to [illegible] the [illegible] of the combination.

B. The Benefits of the Consent Decree

[illegible] that the benefits of the decree outweigh the "competitive benefits" [illegible] appellees [illegible] prevent the defendants-appellees from [illegible] and neither [illegible]

At page 19 of the Memorandum which defendant-appellees filed in the District Court, a rather [illegible] statement is made. To quote:

> "The petitioners for intervention and of demanding a public trial in this case appear t[illegible] hopeless of the braking effect of extended lit[illegible] toof on the continuing efforts to reduce air po[illegible] tion."

We seriously doubt that such a trial would "bra[illegible] the efforts to reduce air pollution. Certainly the [illegible] would not have thwarted such efforts by defendant-appellees, the government's complaint was filed [illegible] easily because defendants-appellees all really were [illegible] spring to keep progress in this area at a standstill [illegible] any event, the industry will have to comply with [illegible] law. The three authorities consulted by the Departm[illegible] of Justice (Memorandum, p. 19) have no particular [illegible] perties in this matter.

The real benefit of the consent decree is plainly [illegible] the automobile manufacturers. The "cooperative efforts" having saved the industry billions of dol[illegible] they now are to be protected from [illegible] a trial and "prima facie" evidence [illegible] Section [illegible] Clayton Act, 15 USC Sec. 16.

The benefits to the public of a [illegible] trial w[illegible] be enormous. Not only could [illegible] suffer[illegible] dress, but the continued effect on the industry would [illegible] compare present and future compliance with anti[illegible] laws.

C. The Statutory Policy Argument.

Defendants-appellees argued (Memorandum, p. 20, *et seq.*) that the statutory policy favors consent decrees. We think it does not. In Part III of this Section, above, we have shown that the statutory policy as expressed by the courts and by Congress is to assist private litigants so that their actions would aid in enforcement of the Act. The reason for the "*prima facie* evidence" provisions is to aid them in this effort. Consent decrees, whereas they have utility in some cases, are nowhere favored as "statutory policy."

There is nothing in the law which requires a court to approve a decree just because the defendants have consented to it. If there were, some of the cases permitting intervention in such matters would not have been so decided. In short, we contend that if the approval of the consent judgment is not in the public interest because it will foreclose the use of the "*prima facie* evidence" clause, then it should be disapproved completely.

As the Court stated in *United States v. Standard Ultramarine and Color Company*, 137 F. Supp. 166 (S.D.N.Y., 1955):

> "If violators may expiate their wrong-doing by payments of token fines, by accepting the proverbial 'slap on the wrist' and to boot, avoid the impact of Sec. 5, then a powerful deterrent to law violation has been removed."

D. The Interest of Amici IS the Public Interest

Defendants-appellees suggested at page 31 of their Memorandum that the only interest of *amici* was to further their own damage actions, and that this was not sufficient. The County and the District are not interested primarily in damages. We have specific responsibilities in public health and in air pollution control. As shown in this brief, these parties have a public interest to protect in the judgment. Indeed, these parties have a much more direct interest than did the parties who were permitted to intervene in *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, [illegible] U.S. [illegible] (1967). The health and safety of at least 2,000,000 people are our responsibility. Our ability to protect that health and safety, and property, has been severely restricted by the action of defendants-appellees.

Defendants-Appellees suggested that the *Cascade* case *supra*, was in effect overruled by this Court in *per curiam* decisions. The fact is that the *Cascade* case is the latest expression of this Court. Defendants-appellees also suggested that the decision was "peculiar." What they do not say is why the "special factual situation" restricts the holding of the *Cascade* case.

[illegible]

E. Adequate Representation by The Department of Justice.

Defendants-appellees asserted that our interests were adequately represented by the government. It is obvious from the cases which have permitted intervention that this is not to be assumed. The government has demonstrated little interest in air pollution control in this case. Our interests are much broader than in enjoining the continuation of a combination which has already served its purpose. A trial of this case would have had far reaching effects upon the future actions of this industry and of other industries. Successful civil actions based upon a favorable judgment for the government would have been even more effective. None of the appellees now before this Court have shown any interest in protecting the rights of persons whose health has been damaged as a result of air pollution. The fact that the public interest was not represented below is illustrated by the number of petitions and objections that were filed with the District Court.[8]

SUMMARY OF ARGUMENT

I

THE CONSENT JUDGMENT FRUSTRATES ACCESS TO THE FACTS OF THE ALLEGED CONSPIRACY.

The decree entered in the District Court effectively prevents persons with meritorious causes of action from securing the information they need to plead and prove the facts of the alleged conspiracy. It is not at all certain that through discovery proceedings and motions, private litigants could discover these facts. Witnesses will have died or forgotten facts, or be unavailable after 15 to 20 years have passed. Even assuming a battery of trained attorneys and unlimited funds, many of the facts nevertheless will be lost forever.

II

THE DECREE FAILS TO PROVIDE SAFEGUARDS NECESSARY TO PROMOTE THE CONGRESSIONAL PURPOSE OF ASSISTING INDIVIDUAL LITIGANTS.

The law provides for private suits and treble damages partly to permit those injured to recover their damages; as well it is another mechanism through which the antitrust law may be enforced. It is the policy of the law, in fact, that private enforcement be an effective added deterrent to the violation of the antitrust laws. The interest of Congress in preventing further combinations by this means will be frustrated if

such suits are made so difficult and expensive that they cannot be successfully prosecuted.

The consent judgment in this case would have been *prima facie* evidence of the conspiracy at least via the insertion of an "asphalt clause." There is precedent for such provisions, and they would provide real penalties not present in the consent judgment.

The material collected over several years of investigation by the United States will be essentially lost unless the transcripts and documents are revealed. Now that the decree has been signed, documents may be placed out of reach of public agencies and private litigants who require them. An order to impound and to reveal the information collected would prevent this loss.

III

THE CONSENT DECREE ENTERED BELOW IS NOT IN THE PUBLIC INTEREST.

As noted, the consent decree will not be effective. The conspiracy alleged has been successful, and has already accomplished its purpose. The real benefit of the judgment is to the defendants-appellees in avoiding a public trial and the lawsuits which would follow it.

The benefits of a successful trial to the public would have been enormous. The door would have been opened for private damage actions that would not only afford redress to injured parties, but also would have a financial impact on the industry encouraging present and

future compliance with the antitrust laws. Unfortunately, the industry is now protected from both a public trial and the *"prima facie* evidence" provision of Section 5 of the Clayton Act (15 U.S.C. Sec. 16). The decree effectively sanctions a conspiracy that has saved the industry billions of dollars while costing the public an amount that may never be possible to determine.

CONCLUSION

The County of Los Angeles and the Los Angeles County Air Pollution Control District, *amici* herein, are firmly convinced that the consent decree entered below is virtually useless, and that this case should have gone to trial with appellant, *amici*, and perhaps others as parties plaintiff.

We feel that the decree itself, the discussion in the brief, and the firm opposition of the United States to the various applications to intervene below all demonstrate that the public interest has not been protected.

It is our feeling that the antitrust policy of the Federal Government should reflect a concern for the collateral effects of industrial conspiracies. In this particular case the consent decree, while meeting the basic economic problems posed by the government's complaint, wholly ignores the more fundamental issues of environmental deterioration and public redress for the same.

To quote from the Jurisdictional Statement filed by appellant City of New York, at page 11-12:

"The procedure followed in the district court raises questions of fundamental importance in the administration of the antitrust laws. These questions, which are as difficult as they are significant, should be resolved following full briefing and argument. Since the City's right to intervene depends upon the resolution of the other issues presented, an order should be entered postponing consideration of the question of jurisdiction until the hearing of the case on the merits. *Sun Oil Publishing Co. v. United States*, 356 U.S. 683."

Only in this way can complete justice be assured. In any event, the fruits of the Federal investigation must not be lost, for they are irreplaceable.

Respectfully submitted,

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JOHN H. LARSON
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Assistant County Counsel

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APPENDIX A—OPINIONS OF THE DISTRICT COURT

Oral Opinion, October 28, 1969.

"asphalt clause",[3] which would produce the same result. However, the defendants have made it clear that they would not consent to such a clause and if it were to be insisted upon, no settlement of the case would be possible.

To allow permissive intervention in this case would certainly delay and prejudice the adjudication of the original parties. Courts, generally, have consistently denied intervention under Rule 24 F.R.Civ.P. in Government anti-trust cases where the purpose is to defeat the entry of a consent decree. *United States* v. *Blue Chip Stamp Company*, *supra*.

All petitions for intervention should, therefore, be denied.

Prior to the institution of this action, the Government impaneled a grand jury to investigate charges that these defendants were engaging in anti-trust activities. After eighteen months, the grand jury was dismissed, without an indictment having been returned. However, during its investigation, a tremendous amount of evidentiary material was gathered together and reviewed and the testimony of many witnesses was obtained. It has been contended by many appearing here as amici curiae that the proposed decree should contain some provision releasing this material, as well as the transcript of the grand jury proceedings, from the cloak of secrecy tra-

[3] An "asphalt clause" gets its name from a group of antitrust cases against defendants engaged in the asphalt business, wherein a consent decree containing an admission of liability was approved. *United States* v. *Allied Chem. Corp.*, 1961 Trade Cas. ¶ 69,923, at 77,641 (D. Mass. 1960); *United States* v. *Bituminous Concrete Ass'n., Inc.*, 1960 Trade Cas. ¶ 69,878 at 77,487 (D. Mass.); *United States* v. *Lake Asphalt & Petroleum Co.*, 1960 Trade Cas. ¶ 69,835, at 77,272 (D. Mass.). So far as the court is aware, such a clause had never been used before and has never been used since. Furthermore, its value is doubtful, for insistence upon it would, for all practical purposes, eliminate the possibility of settling anti-trust cases.

ditionally surrounding such proceedings, in order that it might become available to treble damage claimants. At the hearing, a proposed order was presented to the court, to which all parties have agreed and which this court has signed, requiring that all evidence obtained by the grand jury, as well as its own transcript, be impounded in the hands of the Justice Department, where it may be obtained by treble damage claimants, or others, by subpoena or other appropriate means, where good cause therefor can be shown. This appears to satisfy those making this contention.

Let us now turn to a consideration of the proposed consent decree.

Section 5(a) of the Clayton Act, after providing that a final judgment or decree in an anti-trust action brought by the Government may be used with prima facie effect in treble damage actions, expressly excepts from these provisions consent decrees entered in such actions. In so doing, it implicitly recognizes consent decrees as a means of terminating civil anti-trust actions brought by the Government, and their use has become a most effective technique in anti-trust enforcement. It is reported that between 70 and 75 per cent of all such Government cases are settled in this manner, which allows the Government to obtain a large measure of injunctive relief without tremendous consumption of the limited manpower and financial resources available to the Anti-trust Division.

The decision to settle an anti-trust case in this fashion, like the decision to commence it in the first place, is an administrative decision and is a part of the implementation of the general policy of the Executive branch of government. As such, it is not subject to review by this court.

This court does have the power to disapprove the proposed settlement, but its use requires the exercise of

discretion, based upon legal, as distinguished from administrative, considerations. For instance, the court should withhold its approval if the decree be unenforceable or if it should provide for relief not consistent with the prayer of the complaint. The court may properly consider whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree, on the whole, is against the public interest.

The proposed decree appears to be enforceable, and no contention to the contrary has been made. Furthermore, the relief which the decree provides is consistent with the prayer of the complaint.

It has been urged that the decree adversely affects the rights of treble damage claimants in the prosecution of their own claims. But, while it is true that the decree does not afford prima facie proof of liability, the rights of the claimants to prosecute their own claims is not otherwise affected. We know of no authority, and none has been brought to our attention, which would require the Government to prosecute this case to judgment solely for the purpose of aiding treble damage claimants. The Government is the designated representative of the public, and sound policy requires that it be free to conduct and control its litigation in the public interest. This objection to the decree is not valid.

It is strongly urged by many that the decree should be rejected as not being in the public interest. But no good reason appears to this court for finding this to be so. In the first place, it provides the Government with substantially all the relief that it could have obtained if it had tried the case and won. It avoids the tremendous expense of time and money which would be required of the Anti-trust Division in the event of a trial. The decree brings immediate results, whereas if this case were to be tried, any benefit of a final decree would be delayed many years. It brings an assured result. Those objecting

have all assumed that the Government would win the action if it were brought to trial. But the Government's case is based upon a novel and unadjudicated theory. Knowledgeable people disagree as to the final result. If the Government should try this case and lose, the benefits of the decree would be lost. For these reasons, it appears to the court that the proposed decree is in the public interest.

For the foregoing reasons, all petitions to intervene, as parties, are hereby denied and the proposed consent decree is hereby approved.

DATED: November 7, 1969.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX B.—COMPLAINT.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 69-75-JWC

Filed: 1/10/69

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.;
GENERAL MOTORS CORPORATION;
FORD MOTOR COMPANY;
CHRYSLER CORPORATION; and
AMERICAN MOTORS CORPORATION,
Defendants.

Complaint

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendants named herein, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act.

2. Each of the corporate defendants named herein transacts business and is found within the Central District of California.

II

DEFENDANTS

3. Automobile Manufacturers' Association, Inc., a corporation organized and existing under the laws of the State of New York with its principal place of business in Detroit, Michigan, is made a defendant herein. Automobile Manufacturers' Association, Inc., is a trade association whose membership consists mainly of firms engaged in the business of manufacturing and selling motor vehicles and component parts and accessories thereto in various states of the United States.

4. The corporations named below are made defendants herein. Each of said corporations is organized and exists under the laws of the State indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint said defendants have primarily engaged in the business of manufacturing and selling motor vehicles in various states of the United States, and also manufacture and sell component parts and accessories thereto.

Defendant Corporation	*State of Incorporation*	*Principal Place of Business*
General Motors Corporation	Delaware	Detroit, Michigan
Ford Motor Company	Delaware	Dearborn, Michigan
Chrysler Corporation	Delaware	Highland Park, Michigan
American Motors Corporation	Maryland	Detroit, Michigan

5. Whenever in this complaint reference is made to any act, deed or transaction of a corporate defendant, such allegation shall be deemed to mean that said corporation engaged in said act, deed or transaction by or through its officers, directors, agents or employees while they were actively engaged in the management, direction or control of corporate business affairs.

III

Co-Conspirators

6. Each of the corporations listed below in this paragraph is not named a defendant herein but is named as a co-conspirator and has participated as a co-conspirator with the defendants in the offense hereinafter charged and has performed acts and made statements in furtherance thereof.

Corporation	*State of Incorporation*	*Principal Place of Business*
Checker Motor Corporation (successor to Checker Cab Manufacturing Corporation)	New Jersey	Kalamazoo, Michigan
Diamond T Motor Car Company	Illinois	Cleveland, Ohio
International Harvester Company (a consolidation of International Harvester Company, a New Jersey Corporation, and International Harvester Corporation, a Delaware Corporation)	Delaware	Chicago, Illinois
Studebaker Corporation (successor to Studebaker Packard Corporation)	Michigan	South Bend, Indiana
White Motor Corporation (successor to The White Motor Company)	Ohio	Cleveland, Ohio
Kaiser Jeep Corporation (successor to Willys Motors, Inc., a Pennsylvania Corporation)	Nevada	Oakland, California
Mack Trucks, Inc. (successor to Mack Manufacturing Corporation)	New York	New York

7. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the offense charged in this complaint and have performed acts and made statements in furtherance thereof.

IV

Definition

8. As used herein, the term "motor vehicle air pollution control equipment" means equipment, or any part thereof, designed for installation on a motor vehicle or any system

or ongoing modification on a motor vehicle which is designed to cause a reduction of pollutants emitted from the vehicle, including, but not limited to, any device for the control of emissions of pollutants from the exhaust system, the crankcase, the carburetor, or the fuel tank.

V.

Trade and Commerce

9. Automobiles for the most part are manufactured in the State of Michigan and are shipped therefrom to each of the fifty states of the United States. Some automobiles are assembled in various states of the United States from parts manufactured in the State of Michigan and other states. In 1966, 8,315,000 passenger cars and 15,864,000 trucks and buses; exclusive of off the-road vehicles, were registered in the United States. In that year, 8,604,712 passenger cars valued at more than $47½ billion and 1,791,587 commercial vehicles valued at more than $3.9 billion were produced in this country. Of the trucks produced, 96,560 were built with diesel motors.

10. The largest number of passenger cars registered and new cars sold in any state of the United States in 1966 was in the State of California where 7,621,792 cars were registered and 832,338 new cars sold. The largest number of passenger cars registered in any county of any state in the United States in 1966 was in Los Angeles County where 2,932,980 cars were registered. Similarly, in 1966 California accounted for the largest number of truck registrations and new truck sales with 1,542,984 trucks registered and 150,927 new trucks sold, and Los Angeles County accounted for the largest number of trucks registered, numbering 436,218.

11. Since at least 1953 it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminants. For example, in Los Angeles County, as of January 1967, gasoline-powered motor vehicles

accounted for 12,465 tons out of a total of 14,610 tons, or 85.3% of contaminants emitted into the ambient air daily. As a result of new and continuing requirements that automotive vehicles be equipped with air pollution control devices, a large and growing market for the production and installation of such devices has developed. Motor vehicle air pollution control devices are shipped in interstate commerce either as engine or system modifications or as equipment attached to automobiles, which are shipped from Michigan and other states to each of the fifty states of the United States.

VI

Offense Alleged

12. Beginning at least as early as 1963, and continuing thereafter up to and including the date of this complaint, the defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

13. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are:

(a) to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(b) to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and

conspired to do, including, among other things, the following:

(a) agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

(b) agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and to require "most-favored purchaser" treatment of all parties to the cross-licensing agreement if any one were licensed by a person not a party to that agreement;

(c) agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment:

(1) in 1961 the defendants agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this antipollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) in late 1962 and extending into 1963, the defendants agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory;

(3) in early 1964 the defendants agreed among themselves to attempt to delay the introduction of

new exhaust pollution control measures on motor vehicles sold in California until the model year 1967, despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust antipollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automotive industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966; and

(d) agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

VII

Effects

15. The aforesaid combination and conspiracy has had, among others, the following effects:

(a) hindering and delaying the research, development, and manufacture—both by the defendants and co-conspirators and by others not parties to the agreements alleged herein—and the installation of motor vehicle air pollution control equipment;

(b) restricting and suppressing competition among the defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(c) restricting and suppressing competition in the purchase of patents and patent rights covering motor vehicle air pollution control equipment.

Prayer

Wherefore, the plaintiff prays:

1. That the Court adjudge and decree that the defendants have engaged in a combination and conspiracy, in un-

reasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Sherman Act.

2. That each of the defendants named in this complaint, its successors, assignees and transferees, and the respective officers, directors, agents and employees thereof, and all persons acting or claiming to act on behalf thereof:

(a) be enjoined from continuing, maintaining or renewing, directly or indirectly, the combination or conspiracy hereinbefore alleged, or from engaging in any other practice, plan, program, or device having a similar effect;

(b) be enjoined from entering into any agreements, arrangements, understandings, plan or program with any other person, partnership, or corporation, directly or indirectly:

(1) to delay installation of air pollution control equipment or otherwise restrain individual decisions as to installation dates;

(2) to restrict individual publicity of research and development relating to air pollution control technology;

(3) to require joint assessment of the value of patents or patent rights relating to air pollution control equipment;

(4) to require that acquisition of patent rights relating to air pollution technology be conditioned upon availability of such rights to others upon a most-favored-purchaser basis; or

(5) to respond jointly to requests by government regulatory agencies for information or proposals concerning air pollution control technology unless such agency requests a joint response in a particular case; and

(c) be required to issue to any applicant interested in developing motor vehicle air pollution technology unrestricted, royalty-free licenses and production know-how under all United States patents owned, controlled or applied for to which the cross-licensing agreement dated July 1, 1955, as amended, has been applicable, and to make available to any such applicant all other know-how related to air pollution control technology which has been exchanged with any other defendant.

3. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises, including cancellation of the cross-licensing agreement dated July 1, 1955, as amended, and an injunction ensuring that all future joint arrangements relating to air pollution control technology be appropriately limited as to subject matter of joint effort and numbers of participants so as to maintain competition in the development of air pollution technology.

4. That the plaintiff recover the costs of this suit.

.....

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Baddia J. Rashid
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United States Attorney

.....

Raymond W. Philipps

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APPENDIX C.

Judgment of the District Court.

[¶72,907] United States v. Automobile Mfrs. Assn., Inc., General Motors Corp., Ford Motor Co., Chrysler Corp., and American Motors Corp.

In the United States District Court for the Central District of California. Civil Action No. 69-75-JWC. Entered October 29, 1969.

Case No. 2037 in the Antitrust Division of the Department of Justice.

Sherman Act.

Conspiracy — Automobile Manufacturers — Development of Smog Control Devices—Joint Activities.—Four automobile manufacturers and their trade association were prohibited from conspiring to delay and obstruct the development and installation of pollution control devices for motor vehicles. The decree prohibitions include: (1) restraining in any way the individual decisions of each auto company as to the date when it will install emission control devices; (2) agreeing not to file individual statements with governmental agencies concerned with auto emission and safety standards and from filing joint statements on such standards unless the governmental agency involved expressly authorizes them to do so; (3) continuing a 1955 cross-licensing agreement and refusing to grant royalty-free licenses on auto emission control devices under patents subject to the 1955 agreement to all who may request

them; (4) agreeing to exchange their companies' confidential information relating to emission control devices or to exchange patent rights covering future inventions in this area; and (5) continuing their joint assessment of patents on auto emission control devices offered to any of them by outside parties as well as their practice of requiring outside parties to license all of them on equal terms.

See Combination and Conspiracy, Vol. 1, ¶ 1600; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8834.10.

For the plaintiff: Richard W. McLaren, Asst. Atty. Gen., Badilia J. Rashid, Lewis Bernstein, William D. Kilgore, Jr., Raymond W. Philipps, Bernard M. Hollander, Allen E. McAllester, Charles F. B. McAleer, and C. Brooke Armat, Attys., Dept of Justice.

For the defendants: Gibson, Dunn & Crutcher, Julian O. Von Kalinowski, Paul G. Bower, Wilmer, Cutler & Pickering, Lloyd N. Cutler, and Howard P. Willens, for Automobile Mfrs. Assn., Inc.; Ross L. Malone, Lawler, Felix & Hall, Marcus Mattson, and Robert Henigson, for General Motors Corp.; Overton, Lyman & Prince, Carl J. Schuck, Wayne H. Knight, for Ford Motor Co.; McCutchen, Black, Verleger & Shea, Philip K. Verleger, and William G. Shea, for Chrysler Corp.; O'Melveny & Myers, Allyn O. Kreps, and Girard E. Boudreau, Jr., for American Motors Corp.

Final Judgment

CURTIS, D. J.: The plaintiff, United States of America, having filed its complaint herein on January 10, 1969, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of or finding on any issues of fact or law herein and without this Final Judgment constituting evidence or an admission by any of them in respect to any such issue;

Now, Therefore, before any testimony has been taken and without trial or adjudication of or finding on any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly know as the Sherman Antitrust Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Devices" means air pollution emission control designs, devices, equipment, methods, or parts thereof, for motor vehicles.

(B) "Restricted information" means all unpublished information of the type usually classified as company confidential concerning applied as distinguished from basic research in, or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving, or lowering the cost of, Devices by a motor vehicle manufacturer. "Restricted information" shall not mean (i) information concerning basic research in gaining a fuller knowledge or understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere, or (ii) information relating primarily to equipment, methods or procedures for the testing or measurement of Devices, or (iii) information for or resulting from the testing or measurement of production prototypes of Devices of an advanced stage exchanged solely for such purposes. Information shall be deemed to be published when it is disclosed without restriction to the public, or to media of general circulation, or to the trade press, or to meetings of stockholders, dealers, or financial analysts, or to

meetings of professional, scientific or engineering societies, or committees thereof, the membership of which is not limited to persons employed by defendants or by motor-vehicle manufacturers, or to meetings called by representatives of Federal, state or local governments or agencies authorized to issue motor vehicle emission control regulations.

III

[*Applicability*]

The provisions of this Final Judgment shall be binding upon each defendant and upon each of its subsidiaries, officers, directors, agents, servants, employees, successors and assigns, and upon all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to any transaction between or among a parent company, its subsidiaries, officers, directors, agents, servants and/or employees. Nothing in this Final Judgment shall have any effect with respect to any activities outside the United States which do not adversely and substantially affect the foreign commerce of the United States.

IV

[*Pollution Control Devices*]

(A) Each defendant is enjoined and restrained from:

(1) Combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of Devices;

(2) Entering into, adhering to, enforcing or claiming any right under any provisions of any agreement, arrangement, understanding, plan or program (hereinafter "agreement") with any other defendant or manufacturer of motor vehicles or Devices:

(a) to exchange restricted information;

(b) to cross-license patents or patents rights on Devices which cross-license includes patents or patent rights acquired subsequent to the date of any such cross-license;

(c) to delay installation of Devices or otherwise restrain individual decisions as to installation dates;

(d) to restrict publicity of research and development relating to Devices;

(e) to employ joint assessment of the value of patents or patent rights of any third party relating to Devices;

(f) to require that acquisition of patent rights relating to Devices be conditioned upon availability of such rights to others upon a most-favored-purchaser basis;

(g) to file, in the absence of a written authorization for a joint statement by the agency involved, with any governmental regulatory agency in the United States

authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations, except joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also file a statement individually upon written request by the agency involved; or

(b) not to file individual statements with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations.

(B) Nothing in this Final Judgment shall prohibit any defendant

(1) from furnishing or acquiring any restricted information for the defense or prosecution of any litigation or claim;

(2) from entering into or performing under any otherwise lawful agreement with any other person or conducting *bona fide* negotiations looking to any such agreement:

(a) for the purchase or sale of specific commercial products;

(b) for the license of specific existing patent rights or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or

(c) for the purchase, sale or license of specific existing restricted information or specific engineering services relating to Devices or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or from furnishing or acquiring any restricted information directly relating thereto;

(3) from entering into, renewing or performing under any otherwise lawful agreement with any non-defendant person, firm or corporation that does not account for more than 2% of world production of motor vehicle passenger car, truck and bus units in the calendar year preceding the entering into or renewing such agreement (See Appendix A [Not Reproduced]); or

(4) from entering into, renewing or performing under any agreement which is submitted in writing to the plaintiff and to which plaintiff consents in writing.

(C) Nothing in Section IV(A)(2)(a) shall prohibit any defendant from engaging in any activity outside the United States reasonably necessary:

(1) to the development of, response to, or compliance with existing or proposed vehicle emission laws, regulations or standards of a foreign governmental body, or

(2) to the performance under any otherwise lawful agreement for the production of motor vehicles outside the United States with any person, firm or corporation not engaged in the production of motor vehicles in the United States at the time of entering into or renewing such agreement.

V

[*Withdrawal from Cross-Licensing Agreement*]

(A) Each manufacturing defendant is ordered and directed to exercise its right to withdraw from the AMA cross-licensing agreement of July 1, 1955, as amended, and to take such steps as are necessary to accomplish said withdrawal within one hundred twenty (120) days from the date of entry of this Final Judgment. Notwithstanding such withdrawal defendants may continue to exercise those rights and claims relating to royalty-free licenses under the cross-licensing agreement which have accrued up to the date of entry of this Final Judgment.

(B) Defendant AMA is ordered and directed to relinquish its responsibilities under the AMA cross-licensing agreement of July 1, 1955, as amended, within sixty (60) days from the date of entry of this Final Judgment.

VI

[*Co-operation with Licensees*]

(A) Upon written request therefor and subject to the conditions set forth herein:

(1) Each manufacturing defendant is ordered and directed to grant to any person to the extent that it has the power to do so a non-exclusive, non-transferable and royalty-free license to make, have made, use, lease or sell Devices under any claim of any United States patent or any United States patent application owned or controlled by said defendant or under which it has sub-licensing rights, which patent was issued or application was filed prior to the date of entry of this Final Judgment and licensed under the AMA cross-licensing agreement of July 1, 1955, as amended, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license under this paragraph may provide for the payment of those same royalties to the defendant;

(3) Each manufacturing defendant shall grant to any licensee under (1) above, to the extent that it has the power to do so, an immunity from suit under any foreign counterpart patent or patent application for

any product manufactured in the United States under the license for sale abroad or for any product manufactured abroad and sold in the United States, provided, that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license may provide for the payment of those same royalties to the defendant; and

(3) Defendant AMA is ordered and directed to make available for examination and copying by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment, which are identified in Appendix B [not reproduced];

(B) Any existing licensee of any manufacturing defendant shall have the right to apply for and receive a license or licenses under this Final Judgment in substitution for its existing license or licenses from any manufacturing defendant, insofar as future obligations, and licenses are concerned. Any licensee shall be free to contest the validity and scope of any licensed patent.

VII

[*Notification*]

Defendant AMA is ordered and directed to mail a copy of this Final Judgment to all signatories to the AMA cross-licensing agreement of July 1, 1955, as amended, and to all known domestic manufacturers of

motor vehicles and motor vehicle engines within thirty (30) days from the date of entry of this Final Judgment, and to issue a press release to the domestic trade and business press relating the substance of the Final Judgment.

VIII

[*Inspection and Compliance*]

For the purpose of determining or securing compliance with this Final Judgment, duly-authorized representatives of the Department of Justice shall, upon written request of the Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principle office, be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. Said defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested. No information obtained by the means provided in this Section

shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Expiration*]

Section IV(A)(2)(a) and (g) of this Final Judgment shall expire ten years after the date of entry hereof, provided that plaintiff may apply to this Court for the continuation of one or both of said provisions, such application to be made not later than nine years after the date of entry of this Final Judgment.

X

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate in relating to the construction of or carrying out of this Final Judgment, for the modification or vacating of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

APPENDIX D.

15 U.S.C. Sections 1, 15, 16(a), 29.

15 U.S.C. § 1. Trusts, Etc., in Restraint of Trade Illegal; Exception of Resale Price Agreements; Penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between

brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 15. Suits by Persons Injured: Amount of Recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323 § 4, 38 Stat. 731.

15 U.S.C. § 16. Judgment in Favor of Government as Evidence: Suspension of Limitations.

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has related

said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered in actions under section 15a of this title.

15 U.S.C. § 29. Appeals to Supreme Court.

In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 1122

MARSHALL B. CROSSMAN, ET AL., APPELLANTS

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL.

On Appeal from the United States District Court for the Central District of California

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the defendant-appellees move that the orders of the district court denying appellants' motions be affirmed (or, alternatively, that the appeals from said orders be dismissed). Plaintiff-appellee, the United States, is filing a separate motion.

sponse to this order, among them appellant Grossman's motion to consolidate the government's action with his private treble damage action "brought representatively on behalf of all of the residents of the United States and California" (Tr. 142) after the filing of the proposed judgment. Appellant City of New York filed an application for leave to intervene for the expressly limited purpose of participating in the consent decree hearing or, in the alternative, for leave to appear at the hearing as *amicus curiae*. R. 166.

At the hearing on October 28, 1969, following presentations by the government and the defendants in support of the decree, appellants and some twenty-odd other interested persons were permitted to appear as *amici* (Tr. 4) and to set forth their reasons why the district court should not enter the proposed decree. As the court noted, "the main goal of the intervenors here is to block the proposed decree in the hopes of compelling the parties to litigate this case to judgment" (J.S. No. 1121 at 11a), since a judgment that the defendants had violated the antitrust laws would be *prima facie* evidence of such violation in private treble damage actions.[9] At the con-

[9] The State of California did not appear, having previously advised the Court by letter that it declined to comment on the proposed decree because of the pendency of its own investigation under California law; the letter noted that the Association and the automobile manufacturers are cooperating in this investigation. R. 410.

[10] The City of New York has indicated that it will join the private treble damage plaintiffs who have to date filed thirteen actions against the Association and the automotive manufac-

clusion of the hearing, the court indicated that it would (1) approve the decree, (2) deny the various petitions for intervention and consolidation, and (3) impound all the evidence before the Grand Jury to preserve it for possible discovery in private treble damage actions. J.S. No. 1121, App. A, pp. 1a-8a.

Besides orally presenting the grounds for its decision and entering a minute order recording its actions (R. 538),[11] the court subsequently filed a memorandum opinion on November 7, 1969. J.S. No. 1121, App. A, pp. 9a-15a. In its opinion the court discussed both appellants' filings in the best possible procedural light, namely, as if they had been straightforward applications to intervene of the kind filed by some of the other interested parties. See *id.* at 10a. The opinion stated, as had the oral remarks, that under settled case law private damage plaintiffs should not be permitted to intervene in a government antitrust action to force the case to trial, where, as here, the government had obtained a consent judg-

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turers based on the allegations in the government's complaint. *See* Transcript of Proceedings Before the Judicial Panel on Multidistrict Litigation in Docket No. 31 (*Multidistrict Private Civil Treble Damage Litigation Involving Motor-Vehicle Air Pollution Control Equipment*) (Jan. 23, 1970) at 8, 52-53. The Panel has scheduled further argument for March 27, 1970, on the question of the appropriate forum for consolidation of pretrial proceedings in these actions.

[11] The decree itself was entered the following day, October 29, 1969 (R. 540), as was the impounding order (note 21, *infra*).

[11] In the minute order (R. 538) and in its oral remarks (J.S. No. 1121, App. A, p. 8a), however, the court had referred expressly to the motion for consolidation and had denied it as such.

ment containing relief that was enforceable, consistent with the government's complaint, without prejudice to third party rights, and in the public interest. The court cited the several precedents prohibiting such intervention. *Id.* at 10a-12a. Noting that the government's case was "based upon a novel and unadjudicated theory" and that success after a long trial was not certain (*id.* at 15a), the court referred to the desirability in the public interest of the "assured" and "immediate" result provided by the decree. *Id.* at 14a. Of the more than twenty persons, groups and governmental bodies which appeared below, only appellants have prosecuted appeals from the action of the district court herein. R. 606, 625.[12]

ARGUMENT

These appeals, besides suffering from procedural defects,[13] present no question meriting further argu-

[12] Seven weeks after the entry of the judgment, appellant City of New York filed an application to intervene after judgment for the stated purpose of taking the instant appeal (R. 610), which motion the court duly denied on December 19, 1969, noting that it presented no new grounds for intervention. R. 618.

[13] In this motion for summary affirmance or dismissal we merely note, without extended discussion, the existence of several apparent procedural defects in the appeals. (1) Since orders respecting consolidation are committed to the sound discretion of the trial court, *Stemler* v. *Burke*, 341 F.2d 393, 396 (6th Cir. 1965), Grossman's appeal must fail because the trial court surely did not abuse its discretion in refusing to consolidate a private damage action with the government injunctive case. (2) The denial of Grossman's motion to consolidate, being interlocutory, is not appealable unless it

ment. In approving a consent decree containing provisions for injunctive relief to which neither appellant objects, the district court clearly did not abuse its discretion merely because the decree did not contain an adjudication of violation of the antitrust laws by the defendants. Following recent decisions by this Court, the district court correctly concluded that the entry of such a decree did not impair or impede appellants' rights to pursue private treble damage actions and that judicial insistence upon such an adjudication or admission of liability would contravene the Congressional policy reflected in Section 5(a) of the Clayton Act. The court also properly rejected appellants' argument that, in the absence of an adjudication or admission of liability which would benefit them and other treble damage claimants, the court lacked authority to approve the decree without first requiring a showing of the evidence tending to prove

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should be held to come within the "collateral order doctrine", *see* 5 Moore, *Federal Practice* ¶ 12.02, in which case the appeal from the denial of the motion would appear to lie in the Court of Appeals, rather than this Court, under the test applied in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963), *modified* 375 U.S. 994 (1964). (3) All the relief sought by the City of New York in its first limited application for leave to intervene was in fact granted by the court, *i.e.*, it had been permitted to appear in opposition to the decree, and hence no appeal lies from the court's merely formal denial of that application. The court's denial of the second application, filed seven weeks after judgment and seeking for the first time a right of appeal, should be affirmed on the ground that the application was not timely. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 436-37 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580, *reh. denied*, 390 U.S. 975 (1968).

they can work independently and with one another in the research and development necessary to comply with the increasingly stringent regulatory requirements that are now being imposed on motor vehicle emissions.[28] If this case were to be litigated, defendants' scientists and engineers would have to function throughout a multi-year trial in an atmosphere of uncertainty as to the legality of exchanging *any* type of technical information. Entry of the consent decree not only removes these uncertainties and accompanying delays but also permits "appropriately limited" [29]

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[28] In 1965 the Department of Health, Education and Welfare was authorized by the Congress to establish national standards for permissible emissions from new motor vehicles, 42 U.S.C. § 1857f-1 *et seq.*, and the first such standards were made applicable beginning with the 1968 model year. More stringent standards were imposed by the Department for the 1970 and 1971 model years (reducing hydrocarbon and carbon monoxide emissions by more than two-thirds in comparison with pre-1968 vehicles), and substantially more demanding standards have been recently proposed for the 1973 and 1975 model years. *See* Second Report of the Secretary of Health, Education and Welfare, S. Doc. No. 91-11, 91st Cong., 1st Sess., pp. 38-40 (1969); Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (Feb. 10, 1970); President's Message to Congress on the Environment (Feb. 10, 1970), in 116 Cong. Rec. H 743 (daily ed.).

Installation of approved exhaust emission control devices on most new motor vehicles was first made mandatory in California in 1966 model vehicles. Since then California has enacted legislation prescribing specific levels of permissible pollutants from new vehicles through the 1974 model year, Cal. Health & Safety Code, §§ 39100-39112, and the California Air Resources Board has recently recommended that even lower levels be required by legislation for 1975 model vehicles. *See* Report to the California Air Resources Board by the Technical Advisory Committee (Nov. 19, 1969).

[29] Complaint, Prayer, para. 3, *supra*, page 4.

technical exchanges among the manufacturers in order to advance the common fund of basic knowledge and technical "know-how" about the air pollution problem and the control of automotive emissions.

CONCLUSION

The appeals herein fail to raise any issues not fully considered and correctly decided by the district court. Accordingly, the motion to dismiss or affirm should be granted.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
634 South Spring Street,
Los Angeles, California 90014
and
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SUPREME COURT, U. S.

Nos. 1181 and 1182

In the Supreme Court of the United States

OCTOBER TERM, 1950

CITY OF NEW YORK

v.

UNITED STATES OF AMERICA, ET AL.

MARSHALL S. SILVERMAN AND S. JEROME TAMTEN

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK

v.

UNITED STATES OF AMERICA, ET AL.

No. 1122

MARSHALL H. GROSSMAN AND S. JEROME TAMKIN

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

These are direct appeals from an opinion and order of the district court (J.S. No. 1121, App. 9a-15a) entered in a government antitrust action against the four major automobile manufacturers and their trade association; the order denied appellants' motions to

intervene in opposition to a final consent judgment (J.S. No. 1122, App. 1–12) and to consolidate.

1. After lengthy investigation,[1] the United States, on January 10, 1969, filed a civil complaint against General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and Automobile Manufacturers Association, Inc., charging that the defendants had conspired "to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment" and "to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment" (J.S. No. 1121, App. 21a, ¶ 13). In addition to seeking general injunctive relief against similar collusive behavior, the complaint sought prohibition of certain specific practices, including: joint assessment of patents or patent rights relating to air pollution control technology (*id.* at 24a, Prayer ¶ 2(b)(3)), agreement to condition the acquisition of patent rights relating to air pollution technology upon availability of such rights to others on a most-favored-purchaser basis (*id.* at 24a, Prayer ¶ 2(b)(4)), and joint responses to requests by government regulatory agencies for information concerning air pollution control technology (*id.* at 24a, Prayer ¶ 2(b)(5)). The complaint also asked for the cancellation of a July 1955 patent

[1] A grand jury had investigated the matter for eighteen months, but the investigation concluded in December 1967 without the return of an indictment.

cross-licensing agreement, the issuance to any interested applicant of royalty-free licenses under all United States patents to which that cross-licensing agreement has been applicable, and the provision to any such applicant of all other know-how relating to air pollution technology which has been exchanged among the defendants (*id.* at 25a, Prayer ¶ 3; 2(c)).

2. Negotiations concerning a possible consent judgment began shortly after the complaint was filed. On September 11, 1969, the parties filed a proposed consent judgment with a stipulation that the judgment could be entered after 30 days unless the government withdrew its consent in the interval.

The judgment requires that the 1955 cross-licensing agreement be terminated (J.S. No. 1122, App. 8, ¶ V), that the manufacturing defendants provide any person royalty-free licenses on any patents licensed under the 1955 agreement, and that the Association make available to any person for copying technical reports prepared by the defendants pursuant to the cross-licensing agreement within two years prior to the decree (*id.* at App. 9, 10; ¶ VI(A)(1), (3)). It prohibits the defendants from agreeing with any other defendant or manufacturer to engage in certain specific practices. There are, for example, bans against: cross-licensing of patents or patent rights on pollution control devices where the cross-license includes patents or patent rights acquired subsequent to the date of the cross-license (*id.* at App. 5, ¶ IV(A)(2)(b)); joint assessment of the value of patents or patent rights of any third party relating to such devices

(*id.* at App. 5, ¶ IV(A)(2)(e)); agreeing to condition acquisition of patent rights on pollution control devices upon availability of such rights to others upon a most-favored-purchaser basis (*id.* at App. 5, ¶ IV(A)(2)(f)); joint responses to governmental bodies regarding standards or regulations of air pollution control technology (*id.* at App. 6, ¶ IV(A)(2)(g)); and exchange of restricted information relating to pollution control devices (*id.* at App. 5, IV(A)(2)(a)). The decree also contains a general injunction against combining to restrain the development, manufacture, installation, distribution or sale of motor vehicle air pollution control equipment (*id.* at App. 5, ¶ IV(A)(1)).

On September 17, 1969, the court invited all interested persons and public bodies to submit their views as to whether the proposed final decree should be approved; it scheduled a public hearing on the matter for October 28, 1969. In response to this invitation, twenty-three persons, organizations and government bodies filed papers with the court, both in support of and in opposition to the proposed decree. The government, after examining these comments, urged that paragraph VI(A) be modified to give greater rights to those receiving patent licenses and technical know-how; as a result, on October 17, 1969, the parties stipulated to strike from paragraph VI(A) a proviso which would have required licensees and recipients of know-how to agree to grant the defendants licenses under any future patents based upon information the defendants were required to provide.

3. Twelve petitions to intervene were filed by various governmental bodies and individuals, of which all but one were treble damage claimants.[2]

The appellant in No. 1121, the City of New York, petitioned to intervene under Rule 24 of the Federal Rules of Civil Procedure. The City stated that it was in the process of preparing a treble-damage antitrust suit against the defendants for the same violations of law charged in the complaint of the United States and contended that it therefore had an interest in the case. The City asked the court not to approve the proposed decree until the United States presented "a record" proving that the decree was in the public interest, or unless the decree was amended to include an "asphalt clause."[3] It also asked the court to impound and make available to treble-damage plaintiffs the documentary evidence generated by the Justice Department and grand jury investigations.

The appellants in No. 1122 are treble-damage plaintiffs who moved to consolidate their case (which was

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[2] The applicants other than the appellants were County of Los Angeles, County of Santa Barbara, Bay Area Air Pollution Control District, Air Pollution Control District of the County of Los Angeles, State of New York, State of Connecticut, State of Maryland, State of New Jersey, American Civil Liberties Union, two aldermen from the City of Chicago, and William J. A. Sturtz (J.S. No. 1121, App. 10a).

[3] An "asphalt clause" is an admission of violation of Section 1 of the Sherman Act that would, under Section 5(a) of the Clayton Act, constitute prima facie evidence of violation. It derives its name from three related cases involving the asphalt industry—the only instance in which such a provision has been included in a consent decree. *United States* v. *The Lake Asphalt and Petroleum Co. of Mass.*, 1960 Trade Cases ¶ 69,835.

filed on September 17, 1969) with the government's under Rule 42(a) of the Federal Rules of Civil Procedure. They objected to the proposed decree on substantially the same grounds as those urged by the City of New York.

4. After considering the petitions to intervene and the written comments of interested persons, and after hearing oral comments presented by the appellants and others, the court denied the requested intervention and consolidation. It then found the proposed consent decree in the public interest and approved it. The court also ordered that all evidence obtained in the course of investigating the case be impounded in the Justice Department "where it may be obtained by treble damage claimants, or others, by subpoena or other appropriate means, where good cause" is shown (J.S. No. 1121, App. 13a). The court's opinion explained that the petitioners had failed to establish a right to intervene under Rule 24(a) and that permissive intervention under Rule 24(b) was not warranted since its purpose was to defeat the entry of the consent decree (*id.* at 10a–12a). Noting that the decree provided all the relief the government could have obtained had it won at trial, the court held that the decree was in the public interest (*id.* at 13a–15a).

ARGUMENT

The consent decree in this case provides substantially all of the relief which the government could have obtained if it succeeded in proving its allegations at trial. The decree has put an end to the alleged anticompetitive practices charged in the complaint; it has

assured future competition in the development and marketing of automobile anti-pollution devices by specific provisions which dissipate the effects of the alleged past anticompetitive practices; and it makes comprehensive relief available forthwith, without the risks and delays of litigation.

Among the principal elements of relief are requirements for royalty-free disclosure of all the patents and technical know-how exchanged during the period of the alleged conspiracy; prohibitions against collusive arrangements relating to research, development and marketing of new devices, including a bar against joint statements to government agencies; and provisions restricting future, and annulling past, patent pool arrangements. This comprehensive relief was entered by the court only after a full day's hearing on the proposed judgment in which numerous individuals, organizations and public parties participated both orally and by means of written submissions.

Appellants' principal objections are not that this multifaceted decree is inadequate to dissipate the anticompetitive effects of the conduct alleged in the complaint, but that it does not contain an "asphalt clause" for the benefit of treble damage claimants which would simplify their treble damage suits; that the decree was entered without the taking of evidence as to its public interest aspects; and that it is limited to the relief prayed for in the complaint. None of these contentions warrants upsetting the decree.

1. The appellants in No. 1122, Messrs. Grossman and Tamkin, lack standing to raise these questions.

They are not parties in this case and did not seek to intervene as parties. Instead they moved under Rule 42(a), F.R. Civ. P., to consolidate their newly filed treble damage suit with the government's suit in equity.[4] Consolidation, however, is a matter of judicial convenience and economy designed to avoid repetitious trials of the same issues. The very terms of Rule 42 emphasize that consolidation is a matter of the district court's discretion, since it provides only that the court "may" order consolidation. Moreover, consolidation does not affect any party's substantial rights or confer a power of veto by one consolidated plaintiff over the rights of another. See 5 Moore's *Federal Practice* 42–21 to 42–22. Accordingly, even if the government's action had been consolidated with the treble damage action of Messrs. Grossman and Tamkin, they would have no standing to complain about the settlement.[5]

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[4] Rule 42(a) provides:

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[5] We know of no case in which a government suit in equity for equitable relief under the antitrust laws has been consolidated with a private treble damage action. Not only might serious jury trial problems be raised by the combination of the equity and law actions (see *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469), but the very difference in the objectives of the two suits militates against such consolidation. For this reason the Multidistrict Litigation Act, 28 U.S.C. (Supp. IV) 1407(g), expressly exempts government antitrust suits from its provisions

2. Although the City of New York moved for intervention under Rule 24(a)(2), F.R. Civ. P., on the ground that it intended to file a private treble damage suit,[6] it is well established that such an interest does not authorize intervention. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal.), affirmed *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *United States* v. *Harper and Row, Publishers, Inc.* (N.D. Ill. 1967, unreported), affirmed *sub nom. City of New York* v. *United States*, 390 U.S. 715. While inclusion of an "asphalt clause" would obviously facilitate the prosecution of private damage suits, the absence of this collateral benefit from a consent decree does not "impair or impede" a pri-

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for consolidated pre-trial. This exemption "* * * was requested by the Department of Justice and concurred in by the coordinating committee and the Judicial Conference of the United States, on the basis that the consolidation might induce private plaintiffs to file actions merely to ride along on the Government's cases. Government suits would then almost certainly be delayed, often to the disadvantage of those injured competitors who would predicate damage actions on the outcome of the Government's suit. Furthermore, since section 5(b) of the Clayton Act (15 U.S.C. 16(b)) tolls the statute of limitations during the pendency of the Government's action, there is no need for injured competitors to join in the Government's suit." (S. Rep. 454, 90th Cong., 1st Sess., p. 6.)

[6] Rule 24(a)(2) provides:

"Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

vate treble damage plaintiff's ability effectively to pursue his claim within the meaning of Rule 24(a)(2).

Nor do the City's public interest objections (which have not been pursued by the other public bodies which sought to intervene) warrant intervention. Except where a previous judicial mandate is involved, whether and on what terms a government antitrust suit should be settled is a matter committed by Congress to the exclusive responsibility of the Attorney General. *United States* v. *Swift & Co.*, 276 U.S. 311, 331–332. Thus, where an applicant for intervention objects to a proposed decree primarily on the ground that it does not serve the public interest represented by the Attorney General, and the applicant's ability to protect its private rights under the antitrust laws is not impaired or impeded, intervention is normally denied.[1]

3. There is no legal basis for the appellants' contention (J.S. No. 1121, pp. 6–9; J.S. No. 1122, pp. 17–18) that the district court may compel an antitrust defendant to accept a particular term in a consent decree. While approval of a proposed consent decree is a judicial act (*United States* v. *Swift & Co.*, 286 U.S. 106, 115), elementary concepts of due process bar the district court from imposing a decree without trial upon an antitrust defendant who does not consent. Similarly, the government may insist upon trial where there is a *bona fide* disagreement over elements

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[1] See, *e.g.*, *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Harper and Row, Publishers, Inc.*, *supra*; *Lupton Manufacturing Co.* v. *United States*, 388 U.S. 457; *Pioneer National Title Ins. Co.* v. *United States*, 385 U.S. 1022.

of relief to which it may be entitled. *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334–335. To be sure, *Ward Baking* reserved the question whether "where there is agreement on every substantive item of relief, insistence by the Government upon an adjudication of guilt as a condition to giving its consent to a judgment would conflict with the congressional policy embodied in § 5 of the Clayton Act * * *." 376 U.S. at 334. But that issue is not presented in this case since the government did not insist upon such a condition. Cf. *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wisc.).

Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), provides in substance that government antitrust judgments have a prima facie effect in private suits, except "consent judgments or decrees entered before any testimony has been taken * * *." Congress intended by this exception to encourage defendants to settle government antitrust suits before trial (see S. Doc. No. 584, 63rd Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276). And by it, "Congress indirectly has recognized the Attorney General's authority to utilize consent settlements to terminate antitrust litigation" (*Consent Decree Program of the Department of Justice*, Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess. (Comm. Print 1959) p. 1). The exception has been of great practical importance to the effective administration of the antitrust laws, for it has enabled the government to make the most effective use of its enforcement resources with-

out having to try every case which involves potential treble damage liability.[*]

The instant decree reflects just the kind of negotiations that Congress contemplated. The defendants indicated that they would agree to a decree containing substantially all the equitable relief sought by the government, but refused to accept an "asphalt" clause (J.S. No. 1124, App. 12a). The Attorney General, through the Antitrust Division, weighed the public interest in prompt substantive relief against the risks and delays of litigation, and concluded that an immediate decree without an "asphalt" clause best served the public interest.

In deciding whether to adopt a proposed consent decree a district court, as a practical matter, may accept it as submitted, may invite further negotiations, or may force the government to choose between trial of the merits and dismissal if satisfactory modifications cannot be negotiated. But in making this determination it is not the court's function to weigh de novo the Attorney General's balancing of the considerations leading to settlement. This is true whether the impact of the case is large or small. Such a judicial inquiry would in effect require a trial on the entire congeries of factors bearing on settlement—including the strengths and weaknesses of the government's theory,

[*] More than 70 percent of government antitrust injunction suits have been terminated by consent decrees. *Consent Decree Program of the Department of Justice*, *supra*, pp. 7-10; Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 2512, 89th Cong., 2d Sess., pp. 86-87.

the difficulties of proof, the time that might be required for discovery and trial, the possible relief that might be obtained in the light of the risks of litigation, the resources to be committed in the light of alternative needs, and the public consequences of delay in correcting the competitive injury alleged. The hearing would be more complex than a trial on the merits, and it would apparently involve a trial of the Attorney General's good faith and good judgment. This kind of intrusion into prosecutorial discretion would be inconsistent with both the constitutional nature of the judicial power and traditional concepts of the adversary process.

More specifically, the requirement of such a hearing would be inconsistent with the very nature of a consent decree, which this Court has held does not depend for its validity upon any factual showing. *Swift & Co.* v. *United States*, 276 U.S. 311, 327. The practical impact of such a radical revision of Section 5 on the Department's enforcement efforts would be crippling, since virtually every case involving potential treble damage liability would have to be tried. Moreover, an evidentiary hearing on the propriety of a proposed consent decree would result in a decree "entered after testimony has been taken" to which the prima facie effect attaches. This result would read out of the Clayton Act Section 5(a)'s exception for consent decrees—a step Congress has declined to take.[8]

[8] S. 2512, 89th Cong., 1st Sess., would have given prima facie effect to decrees entered before the taking of testimony. Hearings were held on the bill (Hearings, n. 8, *supra*) but it was not reported. A bill which would give prima facie effect to nolo

4. Since the district court was being called upon to perform a judicial act, it obviously had a duty to examine the proposed consent decree to determine its suitability for adoption as a decree of a court of equity. Accordingly, as noted above, the court did comprehensively review the proposed decree from the standpoint of its enforceability, its relation to the prayer of the complaint, and its effect on the rights of non-parties and the overall public interest (J.S. No. 1121, App. 14a). After a full presentation of views submitted by interested persons both in writing and at a public hearing, the court found that "it provides the Government with substantially all the relief that it could have obtained if it had tried the case and won" (*ibid.*). Thus the court below exercised the broadest standard of review appropriate to consideration of proposed government antitrust consent decrees, and there is no need in this case to attempt to define the minimum acceptable judicial role in the consent decree process.[10]

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contendere pleas, but would leave the law unchanged with respect to consent decrees entered prior to testimony, has been introduced in the current Congress. S. 2157, 91st Cong., 1st Sess.

[10] Appellants in No. 1122 also claim that notice of the hearing on the proposed judgment was inadequate (J.S. No. 1122, p. 13). In this case, the Department followed its customary practice of filing the proposed consent decree at least thirty days before it was submitted for the court's approval and of issuing a descriptive press release which was reported by the various wire services and the national and local press. Dept. of Justice Press Release of September 11, 1969. See 2 CCH Trade Reg. Rep. ¶ 8811. Moreover, on September 17, 1969, the district court ordered that copies of the proposed decree be served upon all

We stress that the proposed judgment fully terminated all the defendants' allegedly anticompetitive practices as demanded by the government, restored the competitive conditions claimed to have been destroyed, and provided safeguards against resumption of the challenged practices.[11] Thus settlement of this case completely accomplished the government's objective in filing the suit, and it did so without the uncertainty, delay and expense that would have resulted had the case gone to trial. The district court's approval of the consent judgment mirrors the congressional determination expressed in Section 5 of the Clayton Act that in such circumstances the desirability of a prompt settlement outweighs any failure to provide a further benefit to the private plaintiffs. The district court, therefore, properly exercised its discretion in adopting the consent decree.

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applicants for intervention. Messrs. Grossman and Tamkin were not served in this manner because they did not file their motion until October 3, 1969. But they, and large numbers of other persons representing widely varying viewpoints, had actual notice and appeared at the district court's hearing of October 28, 1969. Moreover, *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, cited by appellants, is inapposite. It involved a trustee's failure to give notice by mail to beneficiaries whose identity and location were known to the trustee of a proceeding for settlement of accounts which could deprive such persons of substantial property rights. The proposed decree does not affect appellants' property rights or their right to sue.

[11] Since appellants contend that this case presents the issue reserved in *Ward Baking* (see discussion *supra*, pp. 10–11), they evidently would concede that here there has been "agreement on every substantive item of relief" (376 U.S. at 334), and that if the decree included an "asphalt clause" the court's approval of it would be correct?

Somewhat inconsistently, petitioners also suggest that under the catchall clause of the prayer ("such other, further and different relief as the nature of the case may require") the gov-

CONCLUSION

The order of the district court denying appellants' respective motions to intervene and to consolidate should be affirmed.

Respectfully submitted.

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FEBRUARY 1970.

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ernment might be entitled after trial to an order requiring that all cars manufactured during the conspiracy be recalled and equipped with anti-smog devices (J.S. No. 1121, p. 9, n. 11; J.S. No. 1122, p. 16). Whether such relief—which goes not to termination and correction of defendants' anti-competitive behavior, but rather to remedying non-competitive injury which may be a consequence of the allegedly anti-competitive practices—might ever be appropriate in a suit by the government under Section 15 of the Clayton Act, it seems clear that, in light of the novelty of such relief and the fact that it was not specifically prayed for in the complaint, its omission from the consent decree should not be the basis for denying the public the benefits of the comprehensive traditional antitrust relief agreed to by the Attorney General and approved by the court below. Whether such ancillary relief may be obtained by States or their sub-divisions suing as *parens patriae*, or by properly defined classes of individuals, should be determined in private equity suits brought for this purpose.

U.S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, *Appellant*,

v.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees*.

Appeal From the United States District Court for the Central District of California

BRIEF FOR THE CITIES OF BALTIMORE, MD., PHILADELPHIA, PITTSBURGH, SCRANTON, LANCASTER, and ERIE, PA. AS AMICI CURIAE

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UNITED STATES OF AMERICA; AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees*.

Appeal From the United States District Court for the Central District of California

BRIEF FOR THE CITIES OF BALTIMORE, MD., PHILADELPHIA, PITTSBURGH, SCRANTON, LANCASTER, and ERIE, PA. AS AMICI CURIAE

This Brief is filed pursuant to the provisions of Supreme Court Rule 42(4). Amici Curiae all being political subdivisions. Each is a major metropolitan urban area which has an air pollution problem caused by automobile exhaust emissions. If the defendants were guilty of the acts charged in the government's complaint, entry of the consent judgment below adversely affected the interests of each Amicus Curiae and its residents.

OPINIONS BELOW

The district court's oral opinion of October 28, 1969, and its memorandum opinion subsequently filed on November 7, 1969 have not been officially reported. These opinions are set forth in Appendix A, pp. 1a-15a of printed Appendix filed by Appellant City of New York.[1]

JURISDICTION

On January 10, 1969, the United States instituted this civil antitrust action against the defendants pursuant to 15 U.S.C. § 4. The City of New York, by appropriate applications, sought leave to intervene both before and after the district court's approval on October 28, 1969 of a consent judgment submitted by the parties. By orders entered on October 28, 1969 and December 16, 1969, the district court denied the City's intervention applications. On December 22, 1969, the City filed a notice of appeal in the United States District Court for the Central District of California. This Court has appellate jurisdiction by virtue of 15 U.S.C. § 29.

QUESTION PRESENTED

This Brief will discuss the following question, which it is believed is comprehended by the questions that Appellants present:

Where a consent judgment has been negotiated between the United States and the major automobile manufacturers in a civil antitrust suit alleging a Sherman Act conspiracy with respect to motor vehicle air pollution control equipment, affecting all states, cities, political subdivisions and their citizens in the United States:

(a) Did the District Court abuse its discretion by approving and entering the judgment without requir-

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[1] "App." references are to printed Appendix filed by Appellant City of New York.

ing inclusion of a provision giving it prima facie effect in private actions brought by governmental bodies and others?

(b) Did the District Court abuse its discretion by not allowing intervention by representatives of the governmental bodies affected, for the purpose of furnishing a record to permit the District Court to make an independent judicial determination that entry of the decree without a prima facie effect is not in the public interest and that of the governmental bodies seeking to vindicate that interest?

STATUTES INVOLVED

Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), and Rule 24 of the Federal Rules of Civil Procedure are set forth in Appendix B, pp. 15a-16a, filed by Appellant City of New York.

STATEMENT

We hereby adopt the statement as set forth in the jurisdictional statement of Appellant City of New York.

ARGUMENT

Eliminating pollution is now the policy of our national government.[2] Air pollution, in particular, affects directly the ability of man to survive on this planet. The major cause of air pollution is the automobile.[3] This case alleges a conspiracy among major

[2] "Message from the President on Environmental Quality, Feb. 10, 1970, Vol. 146, No. 18, Cong. Record, pp. S. 1604-1614.

[3] Motor Vehicles presently account for 90% of all carbon monoxide, 60% of the hydrocarbons, 50% of the oxides and virtually all of the lead emitted into the atmosphere. Secretary of Health, Education, and Welfare, Second Report to The Congress of the United States Pursuant to Public Law 90-148, The Air Quality Act of 1967, S. Doc. No. 91-11, 91st Cong., 1st Sess. (1969), p. 38.

automobile manufacturers to suppress the use of technology which could arrest such pollution. If true, there is not a public body or citizen who has not been affected by the violation alleged.

The government through the antitrust division had an opportunity to further national policy by insisting on the trial of the case so that the evidence obtained by the government in the course of its investigation would have been fully aired, alerting the states and cities and their citizens to everything the defendants are alleged to have done. In the alternative, the antitrust division could have insisted on inclusion of a clause [4] in the consent decree, giving it prima facie effect in subsequent private antitrust actions.

Instead, a settlement was negotiated between the government and defendants which was accepted by the lower court. No testimony was taken and no prima facie effect flows from the consent decree.

Rather than giving maximum aid to those who have been injured in obtaining redress for their injuries, the decree primarily requires the defendants to cease doing what in the current climate of public awareness and concern over the threat of air pollution they would be obliged to cease in any event.

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[4] An "Asphalt Clause." "The term 'asphalt clause' refers to a specific provision in a consent decree terminating a civil antitrust case brought by the Federal government. The clause provides that the decree shall have a specified prima facie effect in favor of the plaintiffs in certain subsequent private treble damage actions for the same violation. Its existence is the result of administrative and judicial, rather than Congressional action." Kaplan, "The Asphalt Clause—A New Weapon in Antitrust Enforcement," 3 Boston College Industrial and Commercial L. Rev., p. 355 (Spring 1962). Also contains excellent history of the "asphalt clause."

In addition, the development of new technologies and existing and proposed new Federal standards of pollution control make moot much of the relief included in the decree.[5]

The role of private litigants as an adjunct of the government in enforcing the antitrust laws has been recognized in many decisions of this Court.[6] Surely, in a case of this national importance, the government should deal with such litigants as allies, giving them the benefit of the widest possible effect of the government proceedings.

Indeed, the legislative history of Section 5 makes plain the concern of Congress that the private litigant should get the fullest possible benefit out of a government case. It is clear that the primary purpose of this section was to aid private litigants. Its enactment was prompted primarily by a message of President Wilson in 1914, which made specific reference to the inadequacy of existing legislation in assisting the private suitor. Sympathy for his plight ran so strong that the original House Bill provided that government judgments should be conclusive evidence against the defendant. A Senate amendment changed this to "prima facie" only because of doubts regarding its constitutionality. The proviso of Section 5 which exempts consent judgments from the prima facie rule emerged from a House-Senate conference and reflected concern that the bill would seriously affect the government's flexibility when negotiating and bargaining for consent decrees. It is clear, however, that the proviso was not

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[5] 45 CFR Part 85, F. R. Doc. 70-1607; filed Feb. 9, 1970.

[6] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 and cases cited therein.

intended to give the defendant a "right" to capitulate in every case. It was the right of the private litigant with which Congress was primarily concerned—not the rights of the defendant.[7]

Therefore, we submit that the lower court erred in accepting the consent judgment in the circumstances of this case, and that it erred further by not allowing those vitally concerned to make a record, on the basis of which it could be properly determined, what judicial standards should govern the Court's decision and how they should be applied.

When does the "public interest" require that the Court refuse to accept what for all practical purposes is a negotiated settlement between the government and the defendants in an antitrust suit?

It is submitted that this is an appropriate case, indeed a compelling case, for this Court to set forth at least minimal standards to guide the district courts in this unsettled area of the law. Indeed, in view of the fact that apparently almost 80 per cent of government antitrust cases are terminated by consent decree, it would seem that the proper administration of antitrust policy require that this vital area of the law be illuminated by this Court.[8]

The acceptance of a consent judgment prior to testimony and without inclusion of an "asphalt clause"

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[7] This analysis of legislative interest is supported by:

Emich Motors Corp. v. *General Motors Corp., supra; International Shoe Machine Corp.* v. *United Shoe Machine Corp.*, 315 F. 2d 449, 453 (1st Cir.)

[8] Flynn, Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals, 53 Iowa L. Rev. 983, 985, Footnote 3 (April 1968).

gives no aid to the private litigant. The public bodies injured by the violation must start from scratch in proving their case. Unless an immediate and assured injunction against the challenged conduct is of overriding importance, acceptance of such a decree should be subjected to the most thorough and serious scrutiny, on a proper record, where those vitally affected can be heard. Where a showing could be made—as we suggest in this brief—that the injunction is not of overriding importance, other considerations may well outweigh the need for such assured and prompt relief. The difficulty here is that those who could have explored the factors to be considered in arriving at a full determination of those issues were not permitted to intervene.

In reconciling the various interests involved, this Court might consider the possibility that all of the advantages. That Congress foresaw in the passage of Section 5 could be . . . sustained under the circumstances of this case by the requirement that the consent judgment be approved only if an "asphalt clause" be inserted in the judgment.

It has been suggested by one commentator that:

> ". . . . Section 5 was intended to benefit third parties injured by an antitrust violation and provide a stimulus to defendants to settle for the benefit of efficient government enforcement. Rather than being contrary to the Congressional purpose for enacting Section 5 of the Clayton Act, the asphalt clause seems to be a unique device for carrying out the two major purposes behind Section 5—to assist injured third parties and to obtain government enforcement of the consent decrees. Indiscriminate use of the asphalt clause might well hamper the purpose of stimulating capitulation by defendants, but the collective use of asphalt clauses in cases where the government has a strong case

> and the injured third party to be benefited are public agencies or persons unable to litigate a treble damage action seems a worthwhile policy the government should follow. In this way a further deterrent will be added to the antitrust arsenal, the public purse will be spared the expense of duplicating investigations and litigation, third parties injured by antitrust violation will be spared the cost of litigating a complex damage claim, and the courts will be spared the burden of several treble damage suits spawned by successful government unmasking of an antitrust violation."[9]

The District Judge himself recognized that there are occasions when a negotiated consent judgment should not be accepted by the Court. In his opinion he said: "It is the Court's duty to protect the rights of persons who are not parties to the action, and, of course, the decree should not be approved if it is contrary to the public interest." (App. 3a)

But the crucial question is not whether a decree is contrary to the public interest, but rather whether it actually serves the public interest in the best possible way. It is submitted that where, as here, the following criteria are present, the public interest is not served by the acceptance of the consent judgment without the inclusion of, at the very least, an "asphalt clause": (1) the potential damage to the general public resulting from the violations is far-reaching in its magnitude; (2) public agencies, including states, cities and other political subdivisions, have borne the primary brunt of the antitrust violations; (3) such entities have either filed damage actions or indicated they intend to do so, and a multiplicity of lawsuits by such entities is indicated; and (4) the injunctive relief

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[9] Flynn, *supra*, pg. 1012.

obtained by the government, as a practical matter, is of limited utility.

The lower court justified its acceptance of the consent decree as follows:

> "It is strongly urged by many that the decree should be rejected as not being in the public interest, but no good reason appears to this Court for finding this to be so. In the first place, it provides the government with substantially all the relief that it would have obtained if it had tried the case and won. It avoids the tremendous expense of time and money which would be required of the antitrust division in the event of a trial. The decree brings immediate results, whereas if this case were to be tried any benefit of a final decree would be delayed many years. It brings an assured result. Those objecting have all assumed that the government would win the action if it were brought to trial. But the government's case is based upon a novel and unadjudicated theory. If the government should try this case and lose, the benefits of the decree would be lost. For these reasons, it appears to the Court that the proposed decree is in the public interest." (App. 14a, 15a)

Whether or not "it provides the government with substantially all the relief it would have obtained if it had tried the case and won" misses the basic point. That is whether the Court's duty to protect the rights of persons who are not parties to the action, and the public interest is furthered by allowing the entry of a consent judgment without an "asphalt clause". In today's climate of aroused public and governmental consciousness and conscience about pollution, the "assured result" will be brought about by standards pursuant to legislation and also, because the defendants can no longer afford to engage in their past misconduct.

This is the kind of case where the most effective way to discourage any recidivism on their part is to make them responsible for the injuries already caused. To that end a judgment entered after trial, or a consent decree including an "asphalt clause" would be of greater value, than a decree which cannot be used except to compel the defendants to do or refrain from doing certain acts in the future.

The rationale that a "tremendous expense of time and money would be required of the Justice Department in the event of trial" misses another essential point. The lower court appears to be equating the public interest in terms of what is better for the antitrust division. It may well be that the public interest requires that the antitrust division accept this burden, rather than shifting this tremendous expense of time and money to the general public, the states, cities and other political subdivisions affected by the violation. How can the time and money of the Justice Department be spent to better advantage?

That "the government's case is based upon a novel and unadjudicated theory" is not apparent from the pleadings. Certainly, there is nothing either "novel or unadjudicated" about the hard core kind of antitrust conspiracy alleged in the government's complaint.[10]

The trouble with the District Court's conclusions is that they are based on assumptions not necessarily true.

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[10] See *U. S. v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D.C. Mass.); *U. S. v. Davis*, 1953 Trade Cases ¶67,403 (S.D. N.Y.); *U. S. v. New Departure Mfg. Co.*, 204 F. 107 (D.C. N.Y.); *U. S. v. Mich. Tool Co.*, 1956 Trade Cases 69,290 (D.C. Mich.); *U. S. v. General Electric*, 82 F. Supp. 753 (D.C. N.J.).

The Court should have allowed intervention for the purpose of establishing a record upon which sound conclusions could be based.

It is, of course, not necessary to belabor the point that consent judgments do not always serve the public interest. This has been adequately demonstrated in hearings before the antitrust subcommittee of the House Committee on the Judiciary,[11] and by the report of that same subcommittee.[12]

Professor Flynn has described the procedure as follows:

> "At best, judicial implementation of consent decrees in most cases can only be analogized to the performance of a symbolic religious rite by a high priest, or, at worst, as the performance of an important public function with the machine-like logic of a chiclet dispenser. . . . Thus the court is presented with a 'negotiated contract' with little or no understanding of its background, content, or consequences, and mechanically performs the rite of stamping the contract with the approval of the judiciary."[13]

Certainly, in a case which directly affects the heart of the nation and all of its citizens, this mechanical

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[11] Hearings, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, Part 1 (Oil Pipe Lines) Oct. 1957 (2 Volumes), Part 2 (AT&T) May 1958 (3 Volumes).

[12] Report, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, 86th Cong., 1st Sess., Jan. 30, 1959.

[13] Flynn, *supra*, pg. 990.

process, or even the appearance of such a process should be avoided, and all of the standard assumptions and justifications for taking the easiest way out, should be subjected to the normal judicial method for arriving at an informed decision—permitting interested parties to be heard.[14]

This Court, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*,[15] recognized the valuable role which intervention can play in protecting the public interest. There is other precedent for allowing intervention, at least for the purpose of making a record so that the District Court can be fully informed before accepting the consent judgment in an appropriate case. Such a procedure was followed before acceptance of a consent

[14] While it is true, as the district court also pointed out, that the decision to settle an antitrust case is an administrative decision, it is also true that the product of the negotiations may have far-reaching effect on others besides the defendants. In this sense, the procedure is something more than the making of an administrative decision. It is a process of negotiation. In other types of such administrative proceedings, however, the Civil Procedure Act would allow interested parties to appear and present their views. However, the type of proceeding in which consent decrees are negotiated does not fall within the purview of the act. The consent decree process, therefore, is in the nature of an administrative proceeding without any of the trappings of traditional procedures in administrative actions. As a result, the only opportunity for an affected third party to be adequately protected is by intervention at the time the negotiated consent decree is presented to the Court. See 5 USCA 555(b), which provides in part:

> ". . . So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. . . ."

[15] 385 U.S. 129.

decree in *United States* v. *Standard Oil Co. of Calif.*[16] There the court held a "hypothetical trial" on one of the issues involved in the consent decree.

The District Court in this case bases its decision not to allow permissive intervention on the ground that "to allow permissive intervention in this case would certainly delay and prejudice adjudication of the original parties." (App. 12a) But if the Court has a duty, before accepting a consent judgment to determine "whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree is against public interest," (App. 14a) then it is difficult to understand how intervention for the limited purpose of making a record to answer such questions can be prejudicial to any party. Certainly, if the role of the antitrust division is to protect the public interest, that role can only be reinforced by an adequate presentation of precisely what the public interest is or ought to be in a particular case.

The reasons given by the Court in its opinion, both for allowing the entry of the consent decree and for disallowing the limited intervention sought, are based on conclusions not substantiated by what we believe are the actual facts in this case. It is difficult for the most learned of judges to exercise proper discretion, or for the Supreme Court to adequately review District Court actions, where no record has been made. Allowing limited intervention by public bodies in this case would cure this deficiency in these proceedings.

Further, it would be particularly helpful if this Court would establish standards, as suggested, against

[16] United States v. Standard Oil Co. of Calif., 1959 Trade Cases, ¶ 69,399 (S.D. Calif.).

which the District Court could measure the facts developed at such a hearing.

CONCLUSION

A case of this magnitude, affecting as it does the major source of the pollution of our air, requires better protection for the public interest and public body litigants than is afforded by this consent decree. Judicial criteria are needed to guide the District Court. At a minimum, limited intervention is necessary so that a record can be developed against which the District Court can determine appropriately whether the public interest has been sufficiently served by the entry of the consent decree under the circumstances of this case and whether the public body litigants have been adequately protected.

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IN THE

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OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, *Appellant*,

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UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees.*

On Appeal From the United States District Court for the Central District of California

BRIEF FOR THE CITY OF NEW YORK IN OPPOSITION TO MOTIONS TO AFFIRM

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BRIEF FOR THE CITY OF NEW YORK IN OPPOSITION TO MOTIONS TO AFFIRM

Conceding that approval of a consent decree is a judicial act (G.M. at 14; D.M. at 15),[1] appellees move

[1] The abbreviation "G.M." refers to the government's motion to affirm; the abbreviation "D.M." refers to the defendant-appellee's motion to affirm. The abbreviation "App." refers to the appendices to the Jurisdictional Statement.

for summary affirmance. If this Court is prepared to hold without briefs and without argument that informed judicial action occurs when a district judge lays the decree alongside the complaint, the motions to affirm should be granted. But if, as we contend, this question of first impression requires careful briefing, oral argument and the delicate weighing of conflicting interests, this case deserves plenary consideration. We proceed briefly to demonstrate why this is so.

1. Both the defendants (D.M. at 8) and the District Court (App. at 12a) have confused the City's intervention application with applications filed by other parties. The City *did not* seek "to block the proposed decree in the hopes of compelling the parties to litigate this case to judgment." We do not seek to do so here. Rather, the City's consistent position has been that without some meaningful record on which to rely, neither the District Court nor anyone else can ever know whether this decree is in the public interest. As we put it below:

> "It may be that the proposed consent judgment is appropriate on the facts of this case and that its entry will not thwart the underlying policy of the antitrust laws. On the other hand, it may develop that such a judgment is decidedly not in the public interest and would enable these defendants to escape the consequences of their illegal acts as alleged in the complaint with little more than a 'slap on the wrist.' Until the Court has some meaningful basis for deciding which of these alternatives is the case, the City respectfully urges the Court not to approve the judgment."

2. In this Court, the United States candidly concedes that the district judge had an independent judicial function to perform when presented with the consent

decree (G.M. at 12). Performance of that function required that the judge have some factual knowledge of what the case was about. Yet only the parties know what the record compiled during five years of civil and criminal investigation showed, and they strenuously resisted sharing that knowledge with the court or with the other participants in the hearing below. Instead of requiring the proponents of the decree to furnish it with an appropriate factual record, the district court placed the burden of demonstrating why the decree should not be approved upon the non-party participants (App. at 3a-5a, 14a). Small wonder the court concluded that "no good reason appears to this Court for finding" the decree not to be in the public interest (App. at 14a), for under these procedures such a showing could never be made.[2]

3. Appellees suggest that any proceeding in which the District Court sought to inform itself of the facts would run afoul of Section 5(a)'s proviso. (G.M. at 13; D.M. at 16). In the other words, appellees contend that no matter what method the district judge might adopt to inform himself, that would constitute the "taking of testimony" within the meaning of 5(a). Not so.

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[2] It is true that 70% of the Government's antitrust cases are terminated by consent decrees (G.M. at 12, n.8). But the "overwhelming majority" of such consent decrees are routinely approved without opposition, and it is only in a very few cases that objections to proposed consent decrees are raised. ABA, Antitrust Section, *Antitrust Developments: 1955-1968*, 229 (1968). Accordingly, there is no reason to believe that the procedure which we propose will cripple the Department's enforcement of the antitrust laws (G.M. at 13).

Where, as here, a grand jury has taken testimony and received evidence during eighteen months,[3] it would not have been onerous to have required the parties to submit statements of their positions and summaries of their evidence—a procedure specifically endorsed by the Judicial Conference of the United States. *Handbook of Recommended Procedures for Trial of Protracted Cases*, 25 F.R.D. 351, 398 (1960). This would have constituted neither "a trial on the entire congeries of factors bearing on settlement" (G.M. at 12) nor a proceeding "even more complex" than trial (D.M. at 17). But it would have enabled the district judge to approach a difficult judicial task knowing what the case was about.

To suggest that such knowledge is neither "necessary or desirable" (D.M. at 15), or to infer that an effort to obtain such knowledge "would be inconsistent with both the constitutional nature of the judicial power and traditional concepts of the adversary process" (G.M. at 13) is to attempt to deprive the district judge of the ability to perform meaningfully what is concededly a judicial function. Furthermore, the procedure we suggest is neither novel nor unprecedented. See *United States* v. *Standard Oil Co.*, 1959 Trade Cas. ¶ 75,522 (S.D. Calif.); cf. *United States* v. *Grinnell Corp.*, 385 U.S. 563, 581-582.[4] Indeed, we

[3] Surely such proceedings do not constitute the "taking of evidence" for if that were the case, this consent decree already has *prima facie* effect. The City of New York has never contended, and we do not now contend, that the District Court was required to hear a witness give testimony.

[4] It is, moreover, the Department's standard practice in criminal antitrust cases disposed of by *nolo contendere* pleas to supply the district judge with a statement of its position and a summary of the evidence.

can think of no other way—and appellees have suggested none—by which the district judge can "know the record." *United States* v. *Ward Baking Co.*, 376 U.S. 327, 333.

4. In considering the "public interest issue" after remand, the District Court is not required to choose between rejecting the decree outright or requiring the inclusion of an "asphalt clause." It may grant or withhold its consent "upon performance of [any] condition which will safeguard the public interest." *E.g.*, *S.E.C.* v. *United States R. & Imp. Co.*, 310 U.S. 434, 455. For example, it could agree with the government "that the proposed judgment fully terminated all the defendants' allegedly anticompetitive practices" (G.M. at 15), but conclude that it did not *undo* them. It could therefore hold that the public interest would not be satisfied unless defendants installed antipollution devices on cars now on the road.[5] The government's fear (G.M. at 15-16, n. 11) that such relief is inappropriate in a government suit under Section 15 of the Clayton Act, 15 U.S.C. § 25, is patently unfounded. *Mitchell* v. *Robert De Mario Jewelry Co.*, 361 U.S. 283, 291-292; *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-398. And when the Department of Justice suggests (G.M. at 15-16, n. 11) that the states, their political subdivisions and others take on the task of securing the relief that the public interest requires, it abdicates the responsibilities which Congress has placed upon it. *United States* v. *Borden Co.*, 347 U.S. 514, 518-519.

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[5] The complaint alleged that on three separate occasions since 1961 the defendants conspired and agreed not to install antipollution devices on their automotive products. App. at 22a-23a. Such an antitrust violation is neither "novel and unadjudicated" (App. at 15a), nor "untested" or "unsound" (D.M. at 19).

5. Since it is conceded that approval or disapproval of a consent decree is an independent judicial act, the important question is how that act is to be performed. This question, one of first impression, is squarely presented for resolution. Is a district judge limited to examination of the complaint and decree as appellees apparently contend (G.M. at 14; D.M. at 18)? Is the court's inquiry limited to "legal" as opposed to factual considerations, as the trial judge apparently thought (App. at 14a)? Or, as we contend, does the court's duty to ascertain that the proposed decree is in the public interest carry with it the corresponding obligation to "know the record"? Resolution of this question is admittedly difficult, and involves not only application of legal principles but the delicate balancing of conflicting interests, including, not unimportantly, administrative economy and expediency. But this difficulty call for plenary—not summary—consideration.

Since the City's right to intervene depends upon the ultimate resolution of the issues tendered by this appeal,[6] an order should be entered postponing consideration of the question of jurisdiction until the hearing of the case on the merits. *Sam Fox Publishing Co.* v.

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[6] Defendants have suggested that the City obtained all the relief sought by its first intervention application, and that the second application was untimely (D.M. at 10-11, n.14). The first application sought intervention and alternatively sought leave to appeal as *amicus curiae*. Intervention was denied. The fact that the District Court granted the alternative relief and permitted the City to appear as *amicus* does not mean that the City obtained the relief for which it moved. The second intervention application was filed and considered before the expiration of the time for taking an appeal from denial of the first application. Such an application, permitting a single appeal from both applications, is hardly untimely.

United States, 366 U.S. 683. This case should not be decided summarily.

CONCLUSION

By reason of the foregoing, the motions to affirm should be denied.

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SUPREME COURT, U. S.

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Appellees.

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BRIEF OF AMICI CURIAE, COUNTY OF LACKAWANNA, ET AL. IN SUPPORT OF JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AND AMERICAN MOTORS CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICI CURIAE, COUNTY OF LACKAWANNA, ET AL. IN SUPPORT OF JURISDICTIONAL STATEMENT.

The counties of Lackawanna and Luzerne, Pennsylvania, the City of Buffalo, New York and the County of Erie, New York file this brief as *Amici Curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

I.

INTERESTS OF AMICI CURIAE.

Each of the *Amici Curiae* herein (hereinafter collectively referred to as "*Amici*") are a political subdivision as identified below:

County of Luzerne, Pennsylvania
County of Lackawanna, Pennsylvania
City of Buffalo, New York
County of Erie, New York

and as such, share common interests with Appellant, City of New York. In addition, each of the *Amici Curiae* are plaintiffs in a private treble damage action[1] against the defendants and co-conspirators named in *United States of America v. Automobile Manufacturers Association, Inc.*, Civ. Action No. 69-75 (C. D. Cal.), plaintiffs being representatives of a class pursuant to F. R. C. P. 23, the class being defined as:

> "... all municipalities, county and local governments, states and public bodies in the United States, their citizens and members of the public whom they serve ..."

Accordingly, if the defendants have committed the acts alleged by the United States and by *Amici* and the members of the class they represent, *Amici* as well as Appellant have suffered substantial injury to their business and property. Indeed, it is the interests of *Amici* and others similarly situated that the relief requested by the Federal Government Action was designed to protect. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 135, 17 L. Ed. 2d 814, 819, 87 S. Ct. 932 (1967). See *Association of*

1. County of *Lackawanna, Pennsylvania, et al. v. Automobile Manufacturers Association, Inc., et al.*, Civ. Action No. 70-398 (E. D. Pa.)

Data Processing Service Organizations, Inc. v. Camp, U. S. Supreme Court Docket No. 85 (Opinion March 3, 1970); *Barlow v. Collins*, U. S. Supreme Court Docket No. 249 (Opinion March 3, 1970). For these reasons *Amici* are vitally interested in and will be greatly affected by the outcome of this appeal.

II.

ARGUMENT.

The Proposed Consent Decree Without Any Admission of Liability by the Defendants Was Improperly Entered in That It Adversely Affects the Interests of State and Local Governments and Their Citizens and Does Not Rectify the Deleterious Effects Caused by Defendants' Acts.

The consent decree accepted and entered by the District Court did not contain a clause giving the decree prima facie effect in private treble damage actions pursuant to § 5(a), Clayton Act. The Federal Rules of Civil Procedure as well as basic jurisdictional statutes provide the District Court with power to refuse to approve a consent decree absent the § 5(a) clause.[2]

Potential recoveries in private treble-damage actions are the most effective deterrent of violations of the antitrust laws. In exercising their discretion whether or not to accept *nolo* pleas or whether or not to approve stipulated consent judgments, courts should consider whether or not prima facie evidence will be available to plaintiffs in later private civil actions. See Nolo Pleas in Antitrust Cases, 79 Harv. L. Rev. 1475, 1481-82 (1966). "In cases of serious violations

2. "It is certainly within the power of the court to reject a proposed decree even when both sides consent." Dabney, *Consent Decrees Without Consent*, 63 Col. L. Rev. 1053, 1064 (1963).

where substantial private injury has resulted, the policy of Section 5 should override any special considerations that would deny the evidentiary aid to injured parties and would permit defendants to avoid private liability." Section 5 of the Clayton Act and the Nolo Contendere Plea, 75 YALE L. J. 845, 867-68 (1966). By the proviso excluding consent decrees from the operation of the prima facie effect of government proceedings, Congress did not intend to open the door to any willing defendant to escape from obligations for restitution to injured parties arising from its wrongdoings.

> "Congress made convictions in contested cases and convictions after guilty pleas binding in later suits; to argue that Congress meant, at the same time, to allow any defendant to escape who chose to by saying the magic Latin words is to make a mockery of the policy supporting section 5(a). And since the main purpose of that policy was to aid plaintiffs in treble damage suits, it seems that the effect on such suits should be considered when the court, by accepting or rejecting nolo, determines whether the defendant will be excepted from section 5(a)." Nolo Pleas, supra, 79 Harv. L. Rev. at 1483.

There are compelling reasons why the consent decree in this case should have provided for its prima facie effect in subsequent actions:

a. The Subject Matter Is Vital to Life and Well Being.

This Court may take judicial notice of the immediate grave threat of air pollution to our country. Where the subject matter of an antitrust violation concerns such a vital element necessary to life, the courts should scrutinize the consent decree in light of its overwhelming importance

to public interest and welfare. In *U. S. v. Toledo Milk Distributors Association*, 1954 Trade Reg., ¶ 67,918 (N. D. Ohio 1954), the District Court refused to accept pleas of *nolo contendere* in a criminal antitrust action on the ground that the complaint contained allegations of price-fixing for sales of a vital commodity, milk.

b. The Public Interest Can Be Served Adequately Only by a Consent Decree With a Prima Facie Effect or by a Trial on the Merits.

The consent decree in its present form enjoins the defendants from continuing the acts alleged to be in violation of the Sherman Act. The court below reasoned that the decree brings immediate assured results and avoids a tremendous expenditure of taxpayer's money. (App. A, 5a, 14a-15a). These stated benefits of the decree are illusory.

There is no avoidance of "a tremendous expenditure of taxpayers' money." The Government has already made a vast investment in its grand jury investigation. A Government trial would only harvest the fruits of that investment. Furthermore, the savings to the Federal Government in not conducting a trial will be surpassed greatly by the expenditures which will necessarily be made by state and local governments in enforcing their rights and the rights of their citizens. Instead of taxpayers' money being expended by the Justice Department in the prosecution of one trial beneficial to all subsequent related actions, those same taxpayers will be expending a greater amount of money at the state and local government level in the prosecution of a myriad of treble damage actions scattered throughout the various judicial districts.

The alleged benefits from the consent decree of granting the Justice Department the immediate assured results it desired is also illusory. That same result would most

probably be reached by a Government request for a preliminary injunction.[3] Likewise, the result would most likely come about in this case due to the almost unprecedented amount of public and governmental pressures placed upon the defendants and others to clean up and preserve our atmosphere. This pressure is caused by today's concern of the lethal problem of environmental pollution.

Although the consent decree may cause defendants to cease their past activities, it contributes nothing toward rectifying the harm which their alleged acts have caused.

In *New Jersey Wood Finishing Company v. Minnesota Mining & Manuacturing Company*, 381 U. S. 311, 318, 85 S. Ct. 1473, 14 L. Ed. 2d 405, 411 (1965), this Court emphasized that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective inforcement of the antitrust laws." In discussing the impact of § 5(a), the Court stated:

> ". . . in framing § 5(a) Congress focused on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence. This was recognized in Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 95 L. ed. 534, 71 S. Ct. 408 (1951), where we stated that the purpose of § 5(a) was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions' and to permit them 'as large an advantage as the estoppel doctrine would afford had the Government brought suit,' Id., at 568, 95 L. ed. at 544." 381 U. S. at 317.

It is clear that with respect to the present antitrust violations charged against the defendants, the circum-

3. At the very least, it appears that the Government should attempt to obtain preliminary relief before it enters into a consent decree, especially where prompt relief is a major factor in its decision to obtain a consent decree.

stances are proper to blend the effectiveness of private antitrust litigation with the skill and resources of the Justice Department in redressing completely the deplorable conditions to which the defendants have contributed.

Apart from the importance of the issues involved and their direct impact throughout the United States, there is an additional reason that this Court should review the actions of the District Court. This appeal comes to this Court directly from the District Court, in accordance with the Expediting Act of February 11, 1903, 15 U. S. C. Sec. 29. Absent review by this Court, appellant has no other forum to which to turn for review of what it considers to be erroneous rulings by the District Court.

> "(I)n antitrust cases . . . our practice, particularly in cases of direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violations proved. 'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court.' . . . International Boxing Club v. U. S., 358 U. S. 242, 253, 3 L. Ed. 2d 270, 278, 79 S. Ct. 245 (1959) . . .
>
> "(T)he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it . . .
>
> "Our practice reflects a situation created by the congressional authorization, under Sec. 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of

intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '. . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' Hartford-Empire Company v. U. S., 324 U. S. 570, 571, 89 L. Ed. 1198, 1200, 65 S. Ct. 815 (1945)." U. S. v. DuPont De Nemours & Company, 366 U. S. 316, 323-35, 81 S. Ct. 1243, 6 L. Ed. 2d 318, 323-24 (1961).

III. CONCLUSION.

This Court is called upon to determine questions most significant to the full scheme of enforcement of the anti-trust laws. The particular case in which these issues are raised will have meaningful and lasting effects throughout the United States. Accordingly, *amici curiae* respectfully urge that this Court review whether the district court adequately considered whether the consent decree in its present form was proper and whether the public interests of Appellant, *amici curiae* and others similarly situated were adequately protected in the proceedings below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

CITY OF NEW YORK *v.* UNITED STATES ET AL.; and

GROSSMAN ET AL. *v.* AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nos. 1121 and 1122. Decided March 16, 1970

PER CURIAM.

In No. 1121 the motion to affirm is granted and the judgment is affirmed.

In No. 1122 the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.